No. 12081.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK EDWARD ALEXANDER, WESLEY BISSEY, PHILLIP BOCK, BEN DOBBS, DOROTHY BASKIN FOREST, SAMUEL HARRY KASINOWITZ, MARGARET IRIS NOBLE, MIRIAM BROOKS SHERMAN, DELPHINE MURPHY SMITH and HENRY STEINBERG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, in a civil contempt proceeding. Appellants were witnesses summoned to testify before the Grand Jury of that Court. For their refusal to answer certain questions on the ground that their answers might tend to incriminate them they were adjudged in contempt of the Court and sentenced to be confined in the custody of the United States Marshal until such time as they shall answer.

Jurisdiction of this Court is conferred by Title 28 United States Code Section 1291 (new) and Rule 73 of the Federal Rules of Civil Procedure.

Statement of the Case.

Pursuant to the stipulation of the parties and the orders of this Court, appellants and appellee are to file and exchange their respective briefs on or before December 10, 1948, and the cause is to be submitted without further argument. This brief is filed pursuant to these arrangements.

The appeals are presented on a typewritten record, copies of which have been furnished to each member of the court. The record consists of the Clerk's Transcript containing the formal papers from the files of the court below and the Reporter's Transcript of the proceedings in open court, each separately paged. References in this brief to the record will observe this division, describing the Clerk's Transcript as [Clk. Tr. p. ....] and the Reporter's Transcript as [Rep. Tr. p. ....].

The ten appellants before this Court were subpoenaed to appear as witnesses before the Grand Jury of the United States District Court for the Southern District of California. They were served simultaneously at approximately the hour of 7:00 o'clock on the morning of October 25, 1948. The judgments, sentences and commitments from which they appeal were pronounced and entered by the court at approximately midnight of the same night.

These subpoenas required appellants to appear before the Grand Jury at 10:00 o'clock on the morning of October 25. At that time a motion to quash [Clk.. Tr. p. 2] was presented to the District Court and later that morning transferred for hearing to the Honorable Peirson M. Hall, District Judge [Rep. Tr. p. 6]. The grounds of the motion were, briefly, a challenge to the composi-

tion of the Grand Jury; the contention that the Grand Jury was not engaged in a bona fide investigation of any crime but was conducting an investigation instituted by the Attorney General of the United States solely for political reasons; and a claim of denial of equal protection of the laws in that the Grand Jury investigation had been instituted pursuant to a plan and design to harass and annoy persons believed to be members of the Communist Party and to apply the law discriminatorily against them. At that time appellants' counsel, not having had time adequately to prepare the motion and supporting affidavits and authorities, asked for a continuance for that purpose. The continuance was denied and likewise the motion, on the ground that appellants as witnesses had no standing to challenge the composition of the Grand Jury or raise the other matters presented by the motion [Rep. Tr. pp. 41-4]. Appellants were thereupon ordered to appear forthwith before the Grand Jury and testify in response to the subpoenas served upon them [Rep. Tr. p. 44].

At 3:30 o'clock on the afternoon of October 25, appellants were returned from the Grand Jury to Judge Hall's Court, and the government moved for an order directing them to answer questions put to them before the Grand Jury. Appellants had declined to answer the questions on the ground that their answers might tend to incriminate them [Rep. Tr. p. 46]. Counsel for appellants asked for a continuance in order adequately to prepare both facts and law to meet the government's motion. The motion for continuance was denied [Rep. Tr. pp. 48-56, 64-72, 76]. Thereafter there was a separate hearing on the motion of the government to compel each of appellants to answer the questions put to them before the Grand Jury. There appears in the margin the references

to the record wherein the hearing for each appellant began and the order of the court was made directing each appellant to answer the questions.[1]

The questions which had been put to the appellants before the Grand Jury and which they were directed to answer appear in the record at or about the pages indicated in the preceding footnote. They may be briefly summarized as follows:

Appellants Bissey, Noble and Smith were asked substantially the following questions:

(i) Do you know the names of the county officers of the Los Angeles County Communist Party?

(ii) Do you know the table of organization of the Los Angeles County Communist Party?

(iii) Do you know Ned Sparks?

Appellants Alexander, Forest, Kasinowitz and Steinberg were asked substantially the following questions:

(i) Do you know the names of the county officers of the Los Angeles County Communist Party?

(ii) Do you know the table of organization and duties of the Los Angeles County Communist Party?

1

	Hearing	*Order Compelling Answer*
Alexander	p. 183	p. 187
Bissey	p. 118	pp. 144-5
Bock	p. 166	pp. 171-2
Dobbs	p. 146	pp. 153-4
Forest	p. 172	p. 178
Kasinowitz	p. 179	p. 183
Noble	pp. 57, 113	pp. 106-7, 117
Sherman	p. 160	pp. 65-6
Smith	p. 154	pp. 159-160
Steinberg	p. 187	p. 194

[References are to Reporter's Transcript.]

Appellant Dobbs was asked substantially the following questions:

(i) The questions heretofore described in connection with the first group of appellants just above; and in addition thereto,

(ii) "By whom are you employed"; said question having been asked after appellant Dobbs had testified that his occupation was "an organizer."

Appellant Bock was asked the following questions:

(i) The questions described in connection with the second group of appellants just above; and in addition thereto,

(ii) "An organizer for whom?"; said question having been asked after the witness had testified that he was an organizer.

Appellant Sherman was asked the following questions:

(i) Do you know the names of the county officers of the Los Angeles County Communist Party?

(ii) Do you know Ned Sparks?

The hearings on the government's motion to direct appellants to answer the questions above described lasted from 3:30 p. m. until 10:00 p. m. [Rep. Tr. p. 195] with a recess of one and one-half hours for dinner [Rep. Tr. p. 109].

At the conclusion of the hearings, on the government's motion appellants were directed to appear forthwith before the Grand Jury and answer the questions specified in the court's orders. This was at 10:00 o'clock at night [Rep. Tr. pp. 194-5].

Appellants returned to the Grand Jury room and each appeared before the Grand Jury. The questions, heretofore described, were again put to them and they repeated their refusal to answer on the ground that their answers might tend to incriminate them. They were forthwith returned to Judge Hall's Court.

The Court reconvened at 10:35 o'clock at night on October 25, 1948 to hear the government's motion that appellants be confined in jail until such time as they shall answer the questions put to them. Counsel's motion for a continuance on the ground of the lateness of the hour, the general fatigue of appellants and their counsel and the need for time to prepare and present a defense was denied [Rep. Tr. pp. 197-205, 228-9].

Thereupon the court heard the motions of the government as to each appellant, adjudicated appellants in contempt and sentenced them to be confined until such time as they shall answer. The references to the record for the presentment and adjudication and sentence for each of appellants is set forth in the ensuing note in the margin.[2]

The questions for failure to answer which they were adjudicated and sentenced were the same as those set forth

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[2]

	Presentment	*Adjudication and Sentence*
Alexander	pp. 227-8	p. 263
Bissey	pp. 212-4	p. 259
Bock	pp. 221-3	pp. 261-2
Dobbs	pp. 214-7	p. 260
Forest	pp. 223-5	pp. 262-3
Kasinowitz	pp. 225-6	p. 262
Noble	pp. 209-212	p. 259
Sherman	pp. 219-221	p. 261
Smith	pp. 217-9	pp. 260-1
Steinberg	pp. 207-9	pp. 263-4

[References are to Reporter's Transcript.]

hereinabove in connection with the government's motion for an order compelling them to answer.

The court upon motion stayed execution of its sentence against appellants Forest and Sherman until Wednesday, October 27, at 12:00 o'clock noon to permit them to arrange for the care of their children [Rep. Tr. p. 264].

Following the passing of sentence counsel for appellants filed a consolidated notice of appeal and moved for the release of appellants pending appeal [Rep. Tr. pp. 264-5]. Then for the first time the court halted the rapid pace of its proceedings which began at 10:00 o'clock that morning. On its own motion the court continued the hearing for release of the appellants upon bail until the next morning, thus assuring that appellants, with the exception of Forest and Sherman, would spend the night in jail.

On October 28, 1948 appellants filed separate notices of appeal from the judgments, orders and commitments of Judge Hall [Clk. Tr. pp. 12-75]. Appellants had in the meantime been advised by the Clerk of the court below that each of appellants' cases would be docketed separately in the records of that court with a separate judgment, order and commitment for each of appellants, and that it would be necessary to file separate notices of appeal. As the notices of appeal show on their face, copies were mailed by the Clerk to the United States Attorney on October 28, 1948.

On November 3, 1948 appellants were released from custody pursuant to an order of Judge Denman of this

court staying execution of the judgment below and releasing appellants from confinement pending "final decision of this court or until the further order of this court." As required by Judge Denman's order each of appellants has filed with the Clerk of the court below a cash deposit conditioned as provided in the aforesaid order.

Upon their release, and as they stepped out of the jail house door, appellants were again subpoenaed to appear "forthwith, instanter" before the Grand Jury. They were again interrogated by the Grand Jury at approximately five o'clock on the afternoon of November third. We are at liberty to reveal only the questions put to appellants Bock, Dobbs, Kasinowitz and Steinberg since only as to them have there been public proceedings growing out of the interrogation of November third. These questions deal with knowledge of one Dorothy Healy, a publicly known official of the Communist party, and her business and marital connections; these questions raise legal problems substantially identical with those presented in this appeal. From this interrogation have developed presentments in criminal contempt against appellants Dobbs, Kasinowitz and Steinberg and further proceedings involving all appellants before the Grand Jury, all of them having been ordered to appear on December 15, 1948. The trial of the criminal contempt charges is now set for December 14, 1948, and defendants' motion for continuance thereof has been denied, notwithstanding the pendency of this appeal and the close identity of the legal questions tendered in the two proceedings.

Summary of Evidence Received or Proffered by Appellants With Respect to Privilege Against Self-incrimination.

The attention of the trial court was directed to the provisions of the Smith Act (18 U. S. C. 2385, new) and in particular to portions thereof which will be discussed below.

The evidence received in support of appellants' position was the following:

1. Copy of an indictment returned in the United States District Court for the Southern District of New York against William Z. Foster and eleven others charging them with conspiracy to violate the Smith Act solely by virtue of their alleged activities in forming the Communist Party [Resp. Ex. A; Rep. Tr. p. 78].
2. Copy of an indictment returned by the same Grand Jury against one of the aforesaid twelve persons charging him with violation of the Smith Act *solely by virtue of his alleged membership* in the Communist Party, and a stipulation that eleven similar indictments were returned against the other eleven persons involved in the conspiracy indictment described above [Resp. Ex. B; Rep. Tr. p. 81].

In addition appellants offered to prove the following:

1. Motions to dismiss these indictments had been denied [Rep. Tr. pp. 79-80], and the cases arising out of these indictments were set for trial on November 1 or 2, 1948, and were presently pending [Rep. Tr. pp. 79-80].

2. It was the announced plan and intention of the Attorney General to obtain a series of indictments, similar to Respondent's Exhibits A and B, throughout the United States, including specifically the City of Los Angeles, against other persons based solely upon their membership or alleged membership in the Communist Party [Rep. Tr. p. 80-1].

3. An administrative finding of the Attorney General under Executive Order 9835 that the Communist Party is an organization which advocates the overthrow of the American form of government by force and violence [Rep. Tr. p. 82].

4. The Attorney General is causing to be instituted deportation proceedings against numerous persons upon the theory that the Communist Party advocates the overthrow of government by force and violence and that mere affiliation with the Communist Party is sufficient basis for deportation [Rep. Tr. pp. 82-3].

5. The Attorney General has announced that it is the policy and position of his office that anyone who is a member of the Communist Party has violated the aforesaid provisions of the Smith Act and that this is the announced official policy of the government of the United States [Rep. Tr. p. 83].

6. Certain appellants were asked whether they knew Ned Sparks because the government believed that it had information or has information indicating that Mr. Sparks was a prominent official of the Communist Party [Rep. Tr. p. 114].

All offers of proof were made by appellants solely because the denial of their request for continuance deprived them of an opportunity to obtain and present the evidence itself [Rep. Tr. pp. 75-6, 79-80]. All offers of proof were rejected by the court only for the reason that the evidence would be immaterial [Rep. Tr. pp. 106, 116].

The evidence and offers of proof outlined above were first adduced as to appellant Noble [Rep. Tr. pp. 57-114]. The record for each appellant, so far as evidence and offers of proof are concerned, is identical by virtue of the orders of the court incorporating the evidence and offers of proof in each case [Alexander, Rep. Tr. p. 86; Bissey, Rep. Tr. pp. 122-4; Bock, Rep. Tr. p. 171; Dobbs, Rep. Tr. p. 149; Forest, Rep. Tr. pp. 175-6; Kasinowitz, Rep. Tr. p. 182; Sherman, Rep. Tr. p. 164; Smith, Rep. Tr. pp. 157-8; Steinberg, Rep. Tr. pp. 192-3].

In each of the cases appellant made a statement privately in chambers to the Judge. These statements have been incorporated in the record here. Without analyzing each statement in detail, the appellants advised the court that they feared that their answers to the questions might show such knowledge of the officers and organization of the

Communist Party as to link them with that organization; that they were aware that the government was now prosecuting leaders of the Communist Party because of their organization of and membership in the Communist Party; and that the government in these prosecutions and elsewhere was taking the position that the Communist Party is an organization which advocates the overthrow of the government by force and violence, *i. e.,* the type of organization membership in which is proscribed by the Smith Act.

In the contempt proceedings the evidence and stipulations received, the offers of proof made and the objections, grounds and reasons urged in opposition to the government's motions for orders directing appellants to answer were by order of the court deemed part of the record as if repeated *in haec verba* [Rep. Tr. pp. 230-1, 245].

The Court held that answers to the questions could not possibly incriminate the appellants, directed them to answer and adjudged them in contempt and sentenced them for their failure to answer.

ARGUMENT.

I.

The Court Below Erred in Ordering Appellants to Answer the Questions Put to Them Before the Grand Jury and in Adjudging Appellants in Contempt for Their Refusal to Answer Said Questions, in That Under the Fifth Amendment to the Constitution of the United States Appellants Had the Right to Refuse to Answer Said Questions on the Grounds That Answers to Said Questions Might Tend to Incriminate Them. [Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 1, Clk. Tr. p. 102.]

Summary of Argument.

Under the Fifth Amendment to the Constitution of the United States "no person . . . shall be compelled in any criminal case to be a witness against himself." This provision has been construed to mean that no witness can be compelled in any proceeding to answer questions so as to disclose facts which would constitute an admission of a criminal offense, or of any element thereof, or any fact which would constitute a link in a chain of evidence proving such commission, or any fact which would constitute an evidentiary lead to the existence of facts constituting such proof. The appellants made a showing in the trial court to the effect that they feared the possibility of prosecution under the Smith Act, that the Attorney General had in numerous ways indicated that he classified the Communist Party as an organization falling within the terms of the Smith Act and that the Attorney General was prosecuting and threatening to prosecute individuals because of their membership in the Communist Party, with knowledge of the purposes there-

of (*i. e.,* as claimed by the Attorney General, advocacy of the overthrow of our government by force and violence). Association of persons, either through membership or affiliation, in a proscribed party is an element of the offense under the Smith Act. The questions put to appellants were such that answers thereto could (1) directly establish such association; (2) form a link in a chain of evidence leading to a finding of such association, and (3) constitute a lead to evidence of such association.

Argument.

Appellants' claim of privilege was made because they reasonably fear incrimination under sections 10 and 11 of Title 18 of the U. S. Code (old) (Act of June 28, 1940, C. 439, Title I, Secs. 2 and 3, 54 Stat. 671), commonly known as the Smith Act.

Section 10 provides in part,

> "(a) It shall be unlawful for any person * * * (3) * * * to be or become a member of, or affiliate with, any such society, group or assembly of persons [who teach, advocate or encourage the overthrow or destruction of any government in the United States by force or violence] knowing the purposes thereof."

Section 11 provides,

> "It shall be unlawful for any person to attempt to commit or conspire to commit any of the acts prohibited by the provisions of sections 9-11, and 13 of this title."

This law defines as crimes any of the following:

(a) Membership in a proscribed organization;

(b) Affiliation with such an organization;

(c) Any attempt to achieve membership in or affiliation with such an organization;

(d) Any conspiracy to achieve membership in or affiliation with such an organization.

The essence of the crime, then, is the association of individuals into groups. The very foundation of the prosecutor's proof in such a case is association *among* individuals.

It is to be emphasized that the indictments in evidence on which the twelve members of the National Committee of the Communist Party are now awaiting trial in the Southern District of New York [Deft. Ex. A; Clk. Tr. p. 6; Rep. Tr. p. 78; Deft. Ex. B, Clk. Tr. p. 10; Rep. Tr. p. 81] are based solely on the *formation* of the Communist party and *membership* therein, with knowledge of the alleged purposes of that organization. The conspiracy indictment [Deft. Ex. A] charges only a conspiracy to *"organize"* the Communist Party, alleging the same to be an organization advocating overthrow of the United States government by force and violence [Clk. Tr. p. 6, line 24]. The overt acts set forth are simply the organizational steps involved in the dissolution of the predecessor Communist Political Association and the creation of the successor organization, the Communist Party. Thus the government charges that the formation and organization of the Communist Party, *per se,* is a crime under the Smith Act.

The individual indictments charge only *membership* in the Communist Party, knowing that it, as charged in the indictment, engages in the proscribed advocacy.

Appellants offered, but were not allowed, to prove that the Attorney General had announced his intention of bringing similar prosecutions against other persons in other cities, including specifically Los Angeles. The danger raised by the New York indictments was not isolated, but, according to the offer of proof, the beginning of a nation-wide campaign of prosecution against Communists under the Smith Act.

In addition appellants offered to prove below that the Attorney General has made administrative determinations that the Communist Party is an organization which advocates the overthrow of the United States government by force and violence, in connection with the Loyalty Order (E. O. 9835) and deportation proceedings [Rep. Tr. pp. 82-3]. This proof was offered not to lay the basis for a claim of privilege by any of the appellants as a government employee or an alien. It was offered to show the findings of the Attorney General as to the nature of the Communist Party. Presumably the Attorney General, neither individually nor officially, operates in hermetically sealed intellectual chambers. If he has satisfied himself from the facts available to him that the Communist Party is a group which teaches and advocates the overthrow of the United States government by force and violence this is a determination which he will act upon in any capacity where relevant. The proffered evidence established that the Attorney General had, with respect to the Communist Patry, arrived at a conclusion going to the heart of the offense defined in the Smith Act, thereby

creating an imminent and substantial danger of prosecution to "any member of or affiliate with" the Communist Party.

Finally appellants offered to prove that the question concerning Ned Sparks was asked because the government had information that he was a prominent official of the Communist Party [Rep. Tr. p. 114].

It is in this setting (*cf. U. S. v. Weisman,* 2 Cir., 111 F. 2d 260; *U. S. v. Zwillman,* 2 Cir., 108 F. 2d 802; *U. S. v. Cusson,* 2 Cir., 132 F. 2d 413, all discussed *infra*) that the appellants' claim of privilege is to be appraised. The law under which the danger of prosecution arises makes association of persons an important element of the offense; the Attorney General has already determined that, for numerous purposes including prosecution under the Smith Act, the Communist Party is an organization engaged in illegal advocacy. The issue is whether the questions put to appellants were such that answers might constitute direct evidence, a link in a chain of proof, or point to the existence of evidence leading to a finding of association, *i. e.,* membership or affiliation with the Communist Party, or an attempt or conspiracy to those ends.

The first question put to the appellants was whether they knew the officers of the Communist Party of Los Angeles County. Obviously this question called for the personal knowledge of the witnesses, not for something which they may have read in the newspapers or heard repeated as gossip. How does one know the officers of the Communist Party—that is, know it in such a way that he is competent to testify in a court of law on the subject? Ordinarily, it is submitted, such knowledge comes to in-

dividuals only through their membership or participation in the affairs of, or close association with, the organization to the extent that they are familiar with what takes place at its meetings, elections and other inner activities. In other words, the knowledge comes out of some form of association with the organization and its members.

The second question was whether the appellants knew the table of organization and duties of the officers of the Los Angeles County Communist Party. Everything that has been said with respect to the first question applies equally here.

The third question was, "Do you know Ned Sparks?" Appellants offered to prove that the question was asked because the government knew that Ned Sparks was a leader of the Communist Party. Here, again, the question called for an answer which would establish association—and association with the leadership of the Communist Party. True, such association alone need not necessarily indicate membership in, or affiliation with, the Communist Party, or any attempt or conspiracy in that direction; but it could constitute an item of proof or a link in a chain in a whole body of evidence, or point to the existence of evidence calculated to establish such membership, affiliation, attempt or conspiracy.

The fourth question was addressed to certain of the appellants each of whom testified that his occupation was that of "organizer." They were then asked, "By whom are you employed?" Here, the answer might reveal that appellants were organizers for the Communist Party, thus establishing association in another way and drawing tighter the chain of evidence threatening the safety of the appellants.

Can there be any doubt that affirmative answers to the first three questions and the answer, "The Communist Party," to the fourth could be used in evidence against appellants, together with similar answers to other questions to support the contention that in their totality the answers show such an intimate knowledge and association with the Communist Party as could only be available to members or persons affiliated with it? Would not such evidence be admissible against the appellants as links in a chain of evidence designed to establish membership or affiliation in the Communist Party or an attempt or conspiracy to achieve such membership or affiliation? If, as appellants claim is the case, the evidence could be so used, then the privilege was properly invoked.

Furthermore, might not these answers give to the government evidentiary leads through which to establish such membership, affiliation, attempt or conspiracy? Again, if, as appellants insist is the case, the answer is, "Yes," then the claim of privilege was properly made.

In the ordinary criminal case, association between individuals is considered only for the purpose of determining the liability of a defendant for the acts of others. But under the Smith Act *association itself is an essential element of the proof necessary to convict.* It is for this reason that, in the ordnary case, association can be considered only as a link in a chain leading to proof of some essential element of the crime; in this case, association itself is direct proof of one element of the crime. Moreover, prosecution of a person under the Smith Act could proceed on an indictment specifically charging him with a conspiracy or one that is tried on that age-old device of the prosecutor, "the theory of conspiracy." Thus, asso-

ciation with the officers of the Communist Party so as to *know* them to be such and knowledge of their "table of organization" might disclose proof of such connection with the Communist Party or its officers, that it would constitute the basis for admission into evidence of the acts and statements of officers of the Communist Party as binding upon the witness. In other words, proof of knowledge and association on the part of the witness may constitute the foundation for the introduction against him, of evidence which might otherwise not be admissible.

In its brief, the government cites cases indicating that being a Communist is not a crime. As lawyers, counsel herein heartily support this view and trust that in the near future this principle will again be recognized in practice by the government of the United States. Be that as it may, the assertion of the government in its brief is small comfort to the defendants in New York who have already been indicted for membership in the Communist Party and to appellants who feel that they are endangered by the Attorney General's threats of similar indictments against persons in Los Angeles because of their membership or alleged membership in the Communist Party.

The assertion made in the government brief in this regard is simply an indication of the two-faced policy being followed by the Department of Justice. On the one hand, the Department prosecutes Communists because of their membership, labels that Party as a subversive organization advocating the overthrow of the government by force and violence, disqualifies from government employment persons alleged to be Communists, seeks to deport other such persons, and announces that it is carrying on a legal drive against members of the Communist Party all over

the United States. On the other hand, when the government seeks to obtain evidence from individuals who have good reason to fear that they may be incriminated by being forced to reveal association with the Communist Party and whose fear is based on the very policy and conduct of the Department of Justice referred to above, they are met with the bland assertion that there are court decisions which say that it is not a crime to be a Communist. As long as the government continues to prosecute members of the Communist Party, as long as it continues to label and to treat the Communist Party as an organization which advocates the overthrow of the government by force and violence, the danger of prosecution of members of that Party, or persons associated with it or its members, exists; that is sufficient for the claim of the privilege against self-incrimination.

Furthermore, the cases cited by the government on this point are not cases under the Smith Act, and it is prosecution under that Act which the appellants fear.

The government also cites the case of *Schneiderman v. United States,* 320 U. S. 118, 87 L. ed. 1796, which we think correctly holds that the doctrine of guilt by association is contrary to basic constitutional principles. In other words, the views of an organization should not be imputed to individual members. However, the Smith Act provides that if a person belongs to a proscribed organization knowing what it advocates, then he is guilty of a crime regardless of whether or not he himself subscribes to the outlawed ideas. In any event, under the Smith Act, membership itself in the organization is at least one of the elements of the crime and any person who reasonably fears incrimination need not testify in such a man-

ner as to aid the government in establishing as against himself any element of any crime.

Here, certain answers to the questions in and of themselves would *directly* tend to incriminate the appellants because the essence of the crime or at least of one of its component parts is association with other persons, and the answers could reveal in part such association. However, in a consideration of the cases on this point, we will limit ourselves primarily to cases dealing with the law in situations where the answer to the question, in and of itself, could not directly tend to incriminate but where it could only constitute a link in a chain or an evidentiary lead to assist the government in establishing its case.

Born of the struggles of patriots to assert and assure the political and religious liberties we today take as men's inalienable rights,[3] the privilege against self-incrimination was calculated to protect a witness from being compelled to furnish from his mouth any fact, which of itself or because of other facts it might point to, might aid to convict him of crime. In the early case of *United States v. Burr* (*In re Willie*), 25 Fed. Cas. 38, the meaning of the constitutional privilege was laid down by Chief Justice Marshall. There, during the grand jury investigation of treason charges against Aaron Burr, the suspect's secretary was examined concerning a document in cipher which the government wished to connect with Burr. The witness was asked, concerning the document, "Do you understand it?" The privilege was claimed on the ground that an answer might disclose knowledge of treason and thus

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[3]On the origins of the privilege see, R. Carter Pittman, 21 Va. L. Rev. 763 *et seq.;* John E. F. Wood, *The Scope of the Constitutional Immunity,* 34 W. Va. L. Quarterly 2.

establish one element of the crime of misprision of treason. The court construed the question to call only for present knowledge, that is, knowledge at the time the question was asked and not knowledge antedating the court proceedings. The court therefore required Willie to answer.

> ". . . finding that it refers only to the present knowledge of the cipher, it appears to the court that the question may be answered without implicating the witness, *because his present knowledge would not, it is believed, in a criminal prosecution, justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact.*" (25 Fed. Cas. 40.) (Emphasis added.)

Whether or not one agrees with the proposition that no inference of past knowledge could be drawn from the fact of present knowledge, the point is that the basis of the ruling was that the question was one from which not even an inference could be drawn which would constitute a link in a chain of evidence against the witness. Furthermore, the court pointed out that the answer could not even be an evidentiary lead to such a link. There the court was dealing with completed acts. In this case, however, what the witness has to fear is a matter of continuing association. Here, present knowledge is itself a link in a chain of association which constitutes a basic element of the crime; the question concerning present knowledge in this case is identical in its effect with a question concerning past knowledge in the cited case. In addition, while stating one's present understanding or lack of understanding of a document cannot lead to other in-

criminating evidence, the document being an inanimate object, identification with an individual may very well, to use the language of the case, "afford the means of proving" a fact necessary to be proved by the government in conducting a prosecution based upon the association of individuals.

In the *Burr* case, Chief Justice Marshall set forth the principles that it is for the court to decide whether there is possibility of incrimination; if there appears to be such a possibility, it is for the witness alone to decide whether the answer would tend to incriminate him; in determining whether the possibility of incrimination exists, it is not necessary to find that the answer might directly tend to establish an element of the crime; it is sufficient if it appears that the answer might constitute a link in a chain of evidence or afford to the government the means of proving a fact with respect to the alleged crime.

The law on the subject was exhaustively reviewed and formulated in a manner that has remained unchanged until the present in *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. ed. 1110. There in the course of a grand jury investigation into violations of a statute regulating railroad rates the witness was asked whether he had received rates less than the published tariffs or rebates and whether he knew of the practices of others in giving or receiving reduced rates or rebates. The government contended that the witness' claim of the privilege was unfounded because of an immunity statute which, in effect, prevented the use of evidence given under compulsion against the witness in any proceedings to convict him of crime or exact a penalty. The court held that the immunity statute was no substitute for the privilege since it did not prevent

the witness' testimony from being used as evidentiary leads to disclose other facts or witnesses which might be used against him:

> ". . . This, of course [the immunity statute], protected him against the use of his testimony against him or his property, in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." (142 U. S. at p. 564, 35 L. ed. at p. 1114.)

The full significance of the *Counselman* case and its applicability to the facts of this case can only be understood if it is recognized first of all that in construing the sufficiency of the immunity statute the court of necessity had to determine the scope of the privilege. Here was an immunity statute which protected the witness from any use of the evidence against him in any proceeding. However, because the scope of the privilege includes the furnishing of evidentiary leads and because the testimony could have been used for the purpose of obtaining evidentiary leads, it was held that the immunity statute was not sufficiently broad to replace the privilege. This case is authority for the proposition that the privilege may be claimed even though the answers are capable of being

used only for the purpose of furnishing evidentiary leads. That this is so is made clear by the following language of the opinion:

> ". . . It is a reasonable construction, we think of the constitutional provision, that the witness is protected 'from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him.' *Emery's Case,* 107 Mass. 172, 182." (142 U. S. at p. 585, 35 L. ed. at p. 1122).

Where, on the other hand, the immunity statute, by foreclosing any and all prosecution with reference to any transaction, matter or thing concerning which the witness testifies, constitutes a complete substitute for the privilege, the witness may be compelled to answer. (*Brown v. Walker,* 161 U. S. 591, 40 L. ed. 819.) In such a case the witness must testify notwithstanding the criminating nature of his answer because the immunity statute satisfies the basic reason for the privilege, that "the testimony sought cannot possibly be used as a basis for *or in aid of,* a criminal prosecution against the witness" (161 U. S. at p. 597, 40 L. ed. at p. 821—emphasis added). So to serve, the immunity statute must be in effect an act of "general amnesty" available to the witness (161 U. S. at p. 601, 40 L. ed. at p. 822). As in the *Counselman* case, *supra,* the privilege against self-incrimination is defined to cover answers which either provide links in the chain of proof or evidentiary leads for further investigation.

A striking application of this rule is found in *Ballmann v. Fagin,* 200 U. S. 186, 50 L. ed. 433. That case arose out of a grand jury investigation of "the criminal liability of some employee of a national bank from the vaults of which a large amount of cash had disappeared" (200 U. S. at p. 195, 50 L. ed. at p. 437). A witness before the grand jury was asked to produce his cash book. He refused. He was then asked questions "the manifest meaning of which was to fasten upon him an admission that there was a cash book" (200 U. S. at p. 196, 50 L. ed. at p. 437). He likewise refused to answer those questions. On the contempt hearing, the witness offered evidence that there were actions pending against him and others charging them with conducting a scheme of gambling known as a "bucket shop." The trial court's ruling of contempt was reversed.

The court recognized that a cash book, if the witness kept one, would be likely to disclose either receipt of the missing cash or participation in bucket shop activities. From this alone, and without more, the court held that the witness was entitled to his privilege in connection with, *first,* the demand to produce the book, and, *second,* questions designed to establish its existence. On the latter point the decision is of special significance in that it reaffirms the extension of the privilege not only to questions designed to elicit proof of a criminal offense but also to questions designed to obtain evidentiary leads to the obtaining of such proof.

In holding that the *possible* contents of the cash book, in light of the subject matter of the investigation, disclosed sufficient cause for a claim of privilege against the production of the cash book, the court said:

> ". . . The book very possibly may have disclosed dealings with the person or persons naturally suspected, and, especially in view of the charges that Ballmann kept a 'bucket shop,' dealings of a nature likely to lead to a charge that Ballmann was an abettor of the guilty man. If he was, he was guilty of a misdemeanor under Rev. Stat. Sec. 5209, U. S. Comp. Stat. 1901, p. 3497, and no more bound to produce the book than to give testimony to the facts which it disclosed." (Citing *Boyd v. U. S.,* 116 U. S. 616, 29 L. ed. 746; *Counselman v. Hitchcock, supra.*) 200 U. S. at p. 195, 50 L. ed. at p. 437.)

With reference to the questions designed to establish the existence of a cash book the court, through Mr. Justice Holmes, held that the privilege applied. It is clear that the court's holding rests on the proposition that answers to these questions might provide the government with evidentiary leads through which they might obtain the cash book or its contents. It is equally plain that in reaching this result the court knew it was applying settled law:

> ". . . And without any inclination to enlarge a witness's rights beyond the settled requirements of law, we think that the privilege might extend to any question, the manifest object of which was to prove possession or control as a preliminary to calling for the book." (200 U. S. at p. 195, 50 L. ed. at p. 437.)

And again,

> ". . . But the natural explanation of the claim of privilege is that a cash book existed, that Ballmann knew it, and that he believed that if produced it would criminate him in one of the two ways which we have explained. Nothing more need be said about the questions as distinguished from the production of the book." (200 U. S. at p. 196, 50 L. ed. at p. 437.)

The scope of the privilege defined by those cases has never been reduced. *Arndstein v. McCarthy,* 254 U. S. 71, 65 L. ed. 138; *United States v. Weisman,* 2 Cir., 111 F. 2d 260; *United States v. Zwillman,* 2 Cir., 108 F. 2d 802; *United States v. Cusson,* 2 Cir., 132 F. 2d 413; *Foot v. Buchanan* (C. C., Miss.), 113 Fed. 156.

A review of the cases discloses that the application of the privilege in any particular case must of necessity turn on the specific facts there developed. In considering them the problem may properly be separated with reference to two types of questions:

1. There are questions from the face of which it appears that the answer might directly tend to incriminate the witness, in the sense that the answer in and of itself might tend to establish an element of the crime. See for example, (*Counselman v. Hitchcock, supra; Foot v. Buchanan, supra.*) In these cases the witness may claim the privilege without the necessity of any further showing of the danger to him. Here it is appellants' contention that the questions involved do directly tend to incriminate the

witnesses in the sense that the answers in and of themselves might tend to establish that *association* which constitutes one of the basic elements of the crime defined by the Smith Act.

2. The second type of question is one which gives no indication that the answer would tend to incriminate the witness. Where such a question is involved, the witness in order to claim the privilege must show the *danger* of incrimination. In order to establish this danger, the witness is required *at most* to show the following:

> (a) That the danger is not simply imaginary and that there is a reasonable risk of his prosecution of a specific crime, which danger is established either, first, by showing prosecution of others with whom the witness may be connected, or, second, by threats to prosecute persons among whom the witness may be included. (See for example, *United States v. Weisman, supra*; *United States v. Zwillman, supra.*)
>
> (b) That the answer to the question may constitute a link in a chain utilized to establish guilt, or that it may furnish an evidentiary lead assisting the government in obtaining the proof necessary to establish its case.

Once the danger (a. above) is indicated, there must be great liberality in favor of the witnesses in determining whether the answer might constitute a link in a chain of evidence, or an evidentiary lead (b. above).

Regina v. Boyes, 1 Best and S. 311, 329;

Foot v. Buchanan, 113 Fed. 156, 160-1.

The reality of the danger was established by appellants in the court below. They referred to the Smith Act to define the crime, they showed that Communists are being prosecuted under it for forming and belonging to the Communist Party, they offered to show that this prosecution was announced by the Attorney General as the prelude to nation-wide prosecutions of similar tenor which would extend to Los Angeles, and that the Attorney General had made with reference to the Communist Party the determination that is central to liability under the Smith Act, viz.: that it teaches and advocates the overthrow of the government by force and violence. This we submit is no imaginary or unsubstantial danger. Once the government can obtain an admission of membership in or affiliation with the Communist Party from any of these appellants prosecution can be initiated; if it can obtain but an evidentiary lead "the chase," in the words of Judge Learned Hand, will get "too hot" and the "scent, too fresh." (*United States v. Weisman, supra,* at p. 263). But this is not a game of fox and hounds, we are dealing with American citizens and the American Constitution. Whatever may be thought of the political association involved in the questions before the court, the limitation on governmental powers prescribed in the Fifth Amendment must be given full effect.

The principles laid down and the approach indicated by the cases has been applied by the courts to situations where the *association* of the witness with others, as in the case at bar, was the focal point of his claim of privilege. In these cases, the questions did not of themselves indicate the possible incrimination from the answer and the court relied, as we ask the court here to rely, on the "setting" of the question provided by the witness' proof.

The leading case on this branch of the subject is *United States v. Weisman,* 2 Cir., 111 F. 2d 260. There the witness before the grand jury was asked (1) whether he received any cables at Murray's Restaurant; (2) whether he knew anyone who visited, lived in, or stayed at, Shanghai in the years 1934 to 1939. It is difficult to conceive of questions with respect to which it would be more clear that the answers could not directly incriminate. Nevertheless, the court held that, although the questions on their face were innocent, the witness had "proved his excuse." In this connection the defendant had offered into evidence an indictment charging a conspiracy among 30 persons not including himself to import narcotics from Shanghai. The District Attorney had some copies of cables which he was using in the investigation "to which the [first] question almost certainly referred" (111 F. 2d 262). An article had appeared in a New York newspaper indicating that the District Attorney would soon indict a person whose description the witness fit fairly well. In its opinion the court said that the witness in order to show the possibility of incrimination "may not be compelled to do more than to show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects" (111 F. 2d 262).

The similarity between the showing made by the appellants here and that made by Weisman in the cited case is obvious. Here, too, the appellants pointed to indictments, to threats to indict others, and they went as far as they could in pointing out the danger without disclosing "those very facts which the privilege protects." The court was not left to seek out some imaginary danger. The actual and real danger which the appellants feared was specifically

spelled out. In the *Weisman* case, the court went on to say:

> ". . . All crimes are composed of definite elements, and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached. A witness would, for example, be privileged from answering whether he left his home with a burglar's jimmy in his pocket, though that is no part of the crime of burglary." (111 F. 2d at p. 262.)

Thus, again, the court recognizes that acts which in and of themselves may be perfectly innocent, may constitute a link in a chain of evidence establishing guilt or point to the existence of such evidence. In such a case a witness need not testify concerning the "innocent" acts.

The court then pointed out that the "setting" established by the witness indicated that others were being charged with a conspiracy and that the answers to questions which he was asked might tie him in with those other persons. Regarding this the court said:

> ". . . These things made it perilous for him to answer; if he had acknowledged such acquaintances, it would probably have directly connected him with the principals in the conspiracy." (111 F. 2d at p. 263.)

On this point the *Weisman* case is so close to the case at bar as to be controlling. There the prosecution had satisfied itself that there was a conspiracy to violate the narcotics laws. Here the prosecution has satisfied itself that the Communist Party is a conspiracy to violate the Smith Act.

There the question, "Do you know persons who visited, lived in or stayed at Shanghai in the years 1934 to 1939," was held to be likely to refer to the narcotics conspirators because of the setting of the question established by the witness' proof. Here the questions dealing with the officers and table of organization of the Communist Party related on their face to the organization which the prosecution knows has been found to be in violation of the Smith Act. The question concerning Ned Sparks the appellants offered to show was similarly related to what the prosecution deems to be the Smith Act conspiracy. There, in its setting, an answer to the question, "Do you know, etc." was held to be one which "would probably have directly connected him with the principals in the conspiracy" (111 F. 2d at p. 263). Here answers to the questions, "Do you know, etc.," *given the fact that the questions are expressly directed to the organization deemed by the government to be an unlawful conspiracy,* must of necessity result in the same direct connection.

Of similar effect is *United States v. Zwilling,* 2 Cir., 108 F. 2d 802. There the grand jury was investigating an alleged conspiracy "to commit any offense against the United States or to defraud the United States in any manner or for any purpose" (18 U. S. C. A. 88, old). The witness was asked who his business associates were in the years 1928-1932. In support of his claim of the privilege the witness attempted to show, but was prevented by the rulings of the trial court, that the grand jury had evidence that the witness had been engaged in the liquor business during the years in question, that he had been under investigation for income tax violations, that there had been testimony in another case to the effect that the wit-

ness and others had been engaged in illegal liquor activities in years other than those referred to in the questions put to Zwillman. Counsel for Zwillman stated to the court that Zwillman had been in the liquor business up to 1933. The court pointed out (108 F. 2d at p. 803) that activities in the liquor business might involve violations other than of the Prohibition Act such as failure to pay taxes, make returns or affix stamps.

The contempt adjudication was reversed for the failure of the trial court to permit the witness to prove the setting of the questions so as to show the possible incrimination from answering them.

The questions propounded in the *Zwillman* case involve association as in the *Weisman* case and the case at bar. There an admission of association would on its face be innocent but for the setting of the illegal conspiracy in which the associates were engaged. An admission of association under these circumstances might be enough to establish the unlawful conspiracy against the witness.

> ". . . Evidence necessary to show that defendant was engaged in a conspiracy during the years from 1928 to 1932 might well be supplied by proof of the names of business associates engaged in violating the laws relating to the manufacture or sale of liquor. If a conspiracy was shown in those earlier years it would continue unless abandoned and the defendant would have to prove abandonment in order to take advantage of the statute of limitations." (108 F. 2d at p. 803.)

The *Zwillman* case, as the *Weisman* case, involved questions concerning association with other persons. Because of the setting proved or offered to be proved, to the

effect that such association would be with an unlawful conspiracy, it was held that the answers might be incriminating. In the case at bar the questions are directed at association with persons or organizations which the government deems to be engaged in unlawful activities. Answers here, as in the cited cases, might furnish "a link in the chain of incriminating testimony" (108 F. 2d at p. 803, citing *Counselman v. Hitchcock, supra*).

United States v. Cusson, 2 Cir., 132 F. 2d 413, presented a similar question of association. There the witness was asked whether on a visit to Philadelphia in February, 1942, she had "met with any of the Groveses." In support of her claim of privilege she showed that two men named Groves had been tried under an indictment in the Southern District of New York; that she had gone to Mexico before the trial started and returned soon after its close; that, although she had not been subpoenaed for the trial, government counsel asked her if she had been just prior to calling her before the grand jury. On this showing she claimed possible incrimination because her answer "might serve as a link in establishing that they had told her to go to Mexico so as to avoid being called as a witness upon their trial and that this would tend to prove that she had conspired with them to obstruct justice" (132 F. 2d at p. 414).

In the *Cusson* case again the question, "harmless enough on its face," raised a matter of association with other people. An answer might have produced no harm even if the witness had met with the Groveses. But because

the danger of such association had been indicated by the prosecutor's inquiry concerning the subpoena the claim of privilege was allowed:

> ". . . the question put to her by the prosecutor, followed by the effort before the grand jury to learn whether she had talked with the Groveses just before their trial, in our judgment laid a warm enough scent to make its pursuit genuinely perilous to her." (132 F. 2d at p. 414.)

The case strikingly illustrates the approach laid down in *Regina v. Boyes, supra,* that where the danger is shown to be real "great latitude should be allowed to him in judging for himself the effect of any particular question."

More important the case establishes, and expressly on the authority of the *Weisman* and *Zwillman* cases that where the association sought to be established by the question is actually or potentially with an activity or conspiracy deemed by the prosecution to be unlawful, the answer *of necessity* might furnish a link in a chain of evidence as defined in the *Counselman, Ballmann* and *Arndstein* cases, *supra.*

The government so far has relied on one case which arguably makes against appellants' positions, *O'Connell v. United States,* 2 Cir., 40 F. 2d 201. The questions dealing with the witness' acquaintance with Malloy and Malloy's Place raised the problem of association. The majority opinion does not discuss them separately or the factual setting, if any, urged by the witness. Indeed the dissent points out that "there was no record before the court except the statement of the United States attorney" (40 F. 2d at p. 207) and that the witness' "right to refuse to answer these questions seems not to have been con-

sidered" (40 F. 2d at p. 207). Moreover the witness earlier refused to be sworn, claiming his privilege, and had taken the oath only after the court had ordered him. Thereafter he claimed his privilege to all except identifying questions and was again ordered to answer. On his third try he indulged in evasive and obstructive answers. This conduct was also the basis of the contempt judgment, and, in the face of such conduct, the failure of the court to weigh with cautious nicety the claim of privilege to but three of a long line of questions is understandable.

In any event the United States Supreme Court granted certiorari (281 U. S. 716, 74 L. ed. 1136) and before the case could be heard it was dismissed by agreement of the parties (283 U. S. 868, 75 L. ed. 1472). Its value as precedent having been thus destroyed, the case was properly ignored by the Second Circuit in its decisions of the *Weisman, Zwillman* and *Cusson* cases, *supra,* which correctly state the law in cases presenting the problem of the association of the witness with activities deemed by the government to be unlawful.

As has been emphasized again and again in the cases (see *Regina v. Boyes, United States v. Weisman, United States v. Zwillman,* and *United States v. Cusson,* all cited *supra*) where the question is "harmless on its face," the witness claiming the privilege must establish the setting in which the reality and substantiality of the danger to himself is made apparent to the court. The government has heretofore relied, in addition to the *O'Connell* case discussed above, on a number of cases where the privilege was held not to apply in support of its position that appellants' claim of the privilege is not sound. An examination of these cases shows that the claim of privilege in these cases was denied *only because the witness failed to*

establish any setting. The cases are: *Mason v. United States,* 244 U. S. 326, 61 L. ed. 1198; *Camarota v. United States,* 2 Cir., 111 F. 2d 243; *United States v. Flegenheimer,* 2 Cir., 82 F. 2d 751, and *United States v. Weinberg,* 2 Cir., 65 F. 2d 394.

In both *Mason v. United States* and the case on which it so heavily relies, *Regina v. Boyes, supra,* the claim of privilege rested on the *possibilities* of danger conjured up by adroit counsel rather than on probabilities demonstrated by evidence. In the *Boyes* case the claim of privilege was met with a pardon issued by the crown. The witness, a private citizen, countered with the contention that such a pardon did not grant immunity from impeachment of him by Parliament should he become a member. This the court dimissed as simply a "bare possibility," not "real and appreciable with reference to the ordinary operation of law."

So, too in the *Mason* case, where the grand jury was investigating a charge of gambling against six men other than the witness before the grand jury. The questions asked of the witness related to whether he saw games of cards being played at a certain time and place. *No evidence at all was offered by the witness to show how these questions might incriminate him.* Card playing was not illegal. Therefore, an answer to the question in and of itself could not directly incriminate the witness. In holding that the trial court properly ruled that the privilege did not lie, the Supreme Court relies upon and indicates that it is following the *Burr* case, *supra,* which, as noted above, sets forth the propositions that answers to questions may be incriminating where they constitute a link in a chain or furnish an evidentiary lead.

The court also cites *Brown v. Walker,* 161 U. S. 591, 40 L. ed. 819, *supra,* which lays down the rule that the privilege extends to evidence which may possibly "be used as a basis for, or in aid of, a criminal prosecution against the witness" (161 U. S. at p. 597, 40 L. ed. at p. 821).

The court also quotes at length from the case of *Regina v. Boyes,* 1 Best and S. 311, as laying down the correct rule. This English case holds, first, that a showing must be made so that the court can see "from the circumstances of the case and the nature of the evidence which the witness is compelled to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer."

The real point of the *Mason* case is that the witness simply failed to make any showing of danger. In the *Weisman, Zwillman* and *Cusson* cases, *supra,* such a showing was made. Here such a showing was made. In the *Mason* case, the court was left to its imagination, except for counsel's argument, to find the existence of any danger. The witness having established that he was there, the question would have elicited no fact to prove a crime, for to have been setting at a table where cards are played indicates neither his participation nor the playing for stakes of value. Nor would it have elicited an evidentiary lead other than that which the witness had already established—that he was there. The setting in which the danger presented by the question could be

seen was not furnished the court. The court quotes from the case of *Regina v. Boyes, supra,*

> ". . . We indeed quite agree that, if the fact of the danger being once made to appear, great latitude should be allowed to him in judging for himself the effect of any particular question."

Finally, the court agrees that a seemingly innocent question might constitute a danger "by affording a link in a chain of evidence."

The basis for the court's decision is not that the answer to the question could not have been incriminating but that there was no showing of risk:

> ". . . The court below evidently thought neither witness had reasonable cause to *apprehend danger to himself* from a direct answer to any question propounded, *and under the circumstances disclosed* we cannot say he reached an erroneous conclusion."

This evaluation of the *Mason* case was adopted by the Second Circuit in *United States v. Zwillman,* 2 Cir., 108 F. 2d at p. 804.

In *Camarota v. United States,* 2 Cir., 111 F. 2d 243, the witness claimed his privilege in respect of questions related to the sale of wire service to "horse rooms," asserting that he feared incrimination for violation of federal income tax laws. He attempted to make a showing in support of his claim but it was held that the setting (which is not set forth in the opinion) showed only a tendency of his answers to incriminate him under the state gambling laws. The privilege in a federal proceeding does not extend to incrimination under state laws, *United States v. Murdock,* 284 U. S. 141, 76 L. ed. 210.

Thus the holding of the court is simply that no showing in support of the claim of privilege was made; its reliance on the *Mason* case in this respect (111 F. 2d at p. 245) makes this plain.

The government also heavily relies on *United States v. Flegenheimer,* 2 Cir., 82 F. 2d 751. Flegenheimer was charged with income tax evasion, and the government claimed that this was accomplished in part through a bank account which he maintained under the fictitious name of Harmon, jointly with a man named Di Larmi. Di Larmi was called as a witness and asked whether he knew Harmon. He refused to answer but made absolutely no showing of any danger to himself. This case is another holding that when the question does not indicate the danger and the witness makes no showing of the risk, the privilege may not be claimed.

The reliability of the *Flegenheimer* case in any event is in extreme doubt. It has been cited only once and then by the District Court in *In re Weisman,* 31 Fed. Supp. 190, 191. The latter case was reversed on appeal, *United States v. Weisman,* 2 Cir., 111 F. 2d 260. No review of the *Flegenheimer* decision was sought in the Supreme Court. The case is plainly in conflict with *Ballmann v. Fagin,* 200 U. S. 186, 50 L. ed. 433, discussed above.

Another case cited by the government is *United States v. Weinberg,* 2 Cir., 65 F. 2d 394. This is a case which simply follows *Brown v. Walker,* 161 U. S. 591, 40 L. ed. 819, *supra,* holding that an immunity statute is adequate if it is co-extensive with the constitutional privilege.

The government has relied on *United States v. Weisman,* 2 Cir., 111 F. 2d 260, which is discussed at length above. The one opinion which directly supports the gov-

ernment's position is that of the court below, *In re Weisman,* 31 Fed. Supp. 190, and which was reversed on appeal. As a matter of fact it is submitted that the Circuit Court opinion directly supports appellants' position. Apparently the government has misconstrued the following language in the opinion of the appellate court:

> ". . . The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available." (111 F. 2d 262.)

The government interprets this as meaning that a witness must answer questions put to him up to the point where the door is "set a little ajar." A careful reading of the opinion indicates that the language has no such meaning. What is meant is that, *if in order to make his showing upon the basis of which he declines to answer questions,* the door has to be set a little ajar, that is unavoidable. The door is set ajar by the witness indicating the danger which confronts him. In the *Weisman* case the witness accomplished this by introducing testimony showing such danger, *i. e.,* the indictment against others, newspaper items, etc. In this case, the appellants have followed precisely the same course. Where a sufficient showing of the possible danger has been made, the witness need not go on and "show how the incrimination might occur. To do so might make the privilege valueless." *Russell v. United States,* 6 Cir., 12 F. 2d 683, 693 (cert. den. 273 U. S. 708, 71 L. ed. 851.)

It will be recalled that in the instant case appellants' showing of the setting of the questions consisted in part of evidence and in part of offers of proof which the court rejected as immaterial. Where such a showing has been attempted but rejected below the appellate court, for purposes of its review, will treat the rejected evidence as admitted (*United States v. Weisman,* 2 Cir., 111 F. 2d 260, at p. 262) and reverses the adjudication if all the evidence establishes the necessary showing (*United States v. Zwillman,* 2 Cir., 108 F. 2d 802).

There remains but to dispose of contentions variously urged by the government in this litigation to date. The government has stated to the court that appellants' position is that they, not the court, are the sole judges as to whether the answers would tend to incriminate them. This is *not* appellants' position. The law on this question was decided by Chief Justice Marshal in the *Burr* case, 25 Fed. Cas. at p. 40, and has stood ever since. Appellants, indeed, submitted the question to the court below, as they do to this court, on the showing there made. This appeal is prosecuted *not* because the court determined the question in lieu of appellants but because on the facts and the decided cases the court below decided wrongly.

The government also has urged that since appellants were merely witnesses not accused there could be no danger to them. This of course ignores both the realities and the purpose of the privilege. The protection is designed to prevent the witness from ever being accused or tried on evidence obtained from his own mouth. To this end it applies in whatever proceeding the witness is compelled to testify, whether the same be a grand jury (*Counselman v. Hitchcock,* 142 U. S. 547, 563, 35 L.

ed. 1110, 1114); the criminal trial of another (*United States v. Flegenheimer,* 2 Cir., 82 F. 2d 751); deportation cases before the immigration authorities which are civil in nature (*Graham v. United States,* 9 Cir., 99 F. 2d 746, 749); or bankruptcy proceedings (*McCarthy v. Arndstein,* 266 U. S. 34, 40, 69 L. ed. 158, 161).

Finally we come to "constructive immunity." From the animadversions of a "Comment" writer for the Michigan Law Review (41 Mich. L. Rev. 1165) the government has distilled this prosecutor's panacea. The writer of the "Comment" poses the problem, whether a witness is immune from prosecution simply because having first claimed his privilege he yields to the judicial command to answer and gives self-incriminating testimony. That author has been unable to find a "case in which the question under discussion here has arisen," nor is he able to "obtain any light" from texts or law-reviews (*Id.* p. 1167). Arguing obliquely from a few old decisions (only one of which is a federal case and that a District Court opinion) which hold that an accused, interrogated before a grand jury without being told that he is under investigation, may have the indictment quashed, the author concludes that the answer to his problem is in the affirmative (*Id.* p. 1170). Somewhat startled by his conclusion the author asks himself, why, if this is so, has not some sharp criminal availed himself of it? The answer is that it would require a "corrupt attorney," a "corrupt judge" (*sic*), and an improbably confident witness (*Id.* p. 1173).

Upon speculations so idle and conclusions so self-defeating, the government builds its case of "constructive immunity." At the outset it should be said that if the enormously difficult and delicate problems raised by the privilege against self-incrimination could be so abruptly disposed of the courts of this land have labored long in vain. If the government's contention were sound the courts would never have had to determine whether the privilege was rightly claimed in a proceeding designed to punish a refusal to answer or to coerce the giving of a response. There would have been no need for the Supreme Court to have developed so exhaustively the scope and applicability of the privilege in such cases as *Counselman v. Hitchcock, supra,* or *Ballmann v. Fagin, supra,* or examined so carefully the effect of immunity statutes in *Brown v. Walker* and *Arndstein v. McCarthy, supra.* It would have been useless for the learned judges of the Second Circuit to weigh so carefully the proof of the "setting" of questions that did not in and of themselves point to the incriminating nature of the possible answer, as in *United States v. Weisman, supra; United States v. Zwillman, supra;* and *United States v. Cusson, supra.* Are we now to dismiss these labors as but the futile efforts of men so lacking in learning and perspicacity as to fail to see so easy a solution? Is the privilege of self-incrimination, our constitutional barrier against two centuries of inquisition and the accomplishment of a revolution (*cf. Brown v. Walker,* 161 U. S. at pp. 596-7, 49 L. ed. at p. 821) to be exercised by simple surrender at the moment

of peril?[4] It is well to be reminded that the privilege against self-incrimination never operates automatically or by indirection and that the witness who would use it must be prepared to fight for its protection. It is not the humble salve of one who yields:

> "The privilege against self-incrimination is neither accorded to the passive resistant, nor the person who is ignorant of his rights, nor to one indifferent thereto. It is a fighting clause. Its benefits can be retained only by sustained combat. It cannot be claimed by attorney or solicitor. It is valid only when insisted upon by a belligerent claimant in person. [Citing cases.] The one who is persuaded by honeyed words or moral suasion to testify or produce documents rather than make a last ditch stand, simply loses the protection. . . . He must refuse to answer or produce, and test the matter in contempt proceedings, or by habeas corpus." (*United States v. Johnson,* 76 Fed. Supp. 538, 540-1.)

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[4]Significantly the Michigan Law Review author (*Id.* pp. 1172-3) urges that the witness, having answered after the trial judge decides he has no privilege, can protect himself from conviction by being "compelled to prove to the satisfaction of the trial judge" that the indictment was based either on the facts the witness gave or upon "facts discovered only through means" of those facts. By this the destruction of the protection against inquisition is complete. As the law now stands the witness need only show that an answer *may* incriminate. By the author's (and the government's) inversion of the fundamental law the witness would have to answer in a proceeding that is secret and of whose record he can have no copy. Some months later when pleading to the indictment, which is usually drawn in the language of the statute, he must *from memory,* and without knowledge of the complexities of the prosecutor's investigatory techniques, satisfy the trial judge that his answers supplied a factual basis for the indictment or the evidentiary lead to such facts. If this were the law the days of the Inquisition and the Star Chamber would have returned.

The fatal defect in the Michigan Law Review article and the government's contention is that neither consulted the authorities. The law is that immunity in federal proceedings can be granted only by Act of the Congress and that self-incriminating testimony given notwithstanding the witness' privilege earns no immunity whatsoever. In *Mulloney v. United States,* 1 Cir., 79 F. 2d 566, the defendant pleaded in bar to the indictment that he had testified before the grand jury and that his answers gave self-incriminating facts directly related to the indictment. His claim of immunity was denied:

> "There is no question of immunity here. No such question can arise in the absence of a statute granting immunity to a person giving testimony of an incriminating nature. There is no statute under which Mulloney can claim immunity because of what he said or did before the grand jury on July 25, 1933." (79 F. 2d at p. 578.)

To the same effect see: *United States v. Kaplan,* 2 Cir., 7 F. 2d 594; *United States v. Pleva,* 2 Cir., 66 F. 2d 529; *Mattes v. United States,* 3 Cir., 79 F. 2d 127; *United States v. Johnson,* 76 Fed. Supp. 538. (It will be noted in the last case that one of the government counsel is also one of government counsel in the case at bar. In the cited case he correctly urged the law and prevailed.)

There is no such thing as immunity for giving self-incriminating testimony, except as created and conferred by statute. The American practice took over an old common law practice whereby an accomplice turning states evidence against the principal offenders in return for a promise of the prosecutor not to convict him, received thereby an equitable claim to a pardon. In such cases the witness had to give not only self-incriminating evidence

but also facts which could be used to convict others. In return for this he had simply an equitable right to an executive pardon. This right could not be pleaded in bar to an indictment or proceedings to enforce a penalty or forfeiture or raised as a defense on the trial. It is simply a right to appeal to executive mercy, which is enforceable only morally; an agreement with the prosecutor that gives more is without authority and void. Moreover even this narrow, equitable right attaches, not when the witness gives the self-incriminating evidence to the grand jury or prosecutor but only when he has in good faith given the testimony at the trial of his accomplices. It therefore attaches not as result of self-incrimination but in return for assistance performed for the government in obtaining a conviction of others. *The Whisky Cases,* 99 U. S. 594, 25 L. ed. 399; *United States v. Levy,* 3 Cir., 153 F. 2d 995.

> ". . . but we do not find any authority, and none is cited to us, in which such an equitable right to executive pardon, if the witness states fully and fairly the truth, has ever been held to do away with the constitutional privilege not to give evidence against himself, if he chooses to claim it. See Whisky Cases, 99 U. S. 594. It is a mere equity after all, not dependent upon a positive statute, and commensurate only with the full and fair revelation by the witness of the entire truth. If such an equitable exemption from further prosecution affects the constitutional privilege secured by the fifth amendment, then it is difficult to see why the same argument might not have been made in the Counselman Case." (*Ex Parte Irvine* (C. C. Ohio), 74 Fed. 954, 964.)

"Constructive immunity" cannot withstand the irrefutable answers of the constitution and the decisions.

As appellants endeavored to show in the court below, the Attorney General has determined upon a fixed policy of prosecuting Communists, *qua* Communists, under the Smith Act. He has brought some indictments to this end and has threatened to bring others. Under these circumstances, the government cannot, any more than in any other case, extract from the mouths of his potential victims evidence to assist it in building its case. This is a vital and profound principle of the democracy we live by; the very evils the Attorney General claims to be threatening our freedom require that he and the courts scrupulously observe them in the administration of our laws.

> "Men now in concentration camps could speak to the value of such a privilege, if it were or had been theirs. There is in it the wisdom of centuries, if not that of decades. . . . [The Court] cannot be partner or partisan with the prosecutor, subtly or otherwise, and retain the confidence of the accused and the public or its own self-respect. . . . In our system the accused is not such [a criminal] until the jury pronounces 'guilty.' Until then the court, whether magistrate or trier of ultimate fact, should not extract the word from him or permit its use against him for conviction when it or another court has done so. The privilege still stands guard when so much is attempted by inquisition, however subtle, at any stage of the proceedings, preliminary or otherwise." (Rutledge, J., for the court, in *Wood v. United States* (App. D. C. 1942), 128 F. 2d 265, 278-9.)

II.

The Court Below Erred in Ordering Appellants to Answer the Questions Put to Them Before the Grand Jury and in Adjudging Appellants in Contempt for Their Refusal to Answer Said Questions in That Said Questions and Said Orders Were Directed to the Compulsory Disclosure by Appellants of Their Association or Affiliation, or the Absence Thereof, With the Communist Party, a Political Organization, or With Officers or Members Thereof and Thereby,

(A) Interfered With, Obstructed, Coerced and Abridged the Exercise of the Rights and Duties of Political Expression Through Speech, Assembly, Association and Petition, in Contravention of the First Amendment to the Constitution of the United States, and

(B) Deprived Each of Appellants of the Right to Privacy and Silence in Such Matters in Contravention of the Fourth and Fifth Amendments to the Constitution of the United States, and

(C) Interfered With, Obstructed, Coerced and Abridged the Exercise of the Governmental Powers Reserved to the People Under the Ninth and Tenth Amendments to the Constitution of the United States. [Statement of Points Upon Which Appellants Intend to Rely on Appeal, Points 2, 3 and 4, Clk. Tr. pp. 102-3.]

Summary of Argument.

It has been shown in Point I, *ante,* that the questions put to appellants before the Grand Jury were directed to their political affiliation. *Pro tanto* the questions were also directed to their political belief. The point of the proceedings below was that they were designed to *compel* appellants to disclose *their own* political beliefs and associations. This argument is devoted to show that the court may not *compel* such answers from a witness even where it may have a legitimate reason for obtaining information involving the disclosure of such belief or association. Compulsory disclosure of such matters is beyond the power and competence of government. Persons, under the First Amendment, have an absolute right to whatever political beliefs and political association they choose. These rights are paramount to the authority of government. Indeed they are the bedrock upon which our entire system of democratic, representative government rests. These rights delimit an area in which the government was deliberately forbidden to enter by the framers of our Constitution, for the purposes above described.

In order to safeguard these personal freedoms the Fourth and Fifth Amendments throw around the citizen the barrier of silence and privacy against the effort of government by compulsory inquiry or inquisition to intrude into the citizen's own area of political belief and association. Distilled from the turbulent, perfervid struggles of the people of England for religious and political liberation from an official religion and a divinely sanctioned dynasty and the struggles of their colonial counterparts against Puritannical conformity and imperial oppression, these amendments were specifically calculated to be asserted as a right of silence by the citizen

to any effort by his government—his agent, if you will—forcibly to invade his special reserve of political deliberation and expression.

Finally the effort to compel answers to these questions transgressed our fundamental, constitutional separation of government powers. By the Ninth and Tenth Amendments powers not expressly granted the people's agent, the government, were reserved to them, the principals. These powers include those to examine, discuss and hold political beliefs, to take organized action through political parties to advance these beliefs and to alter or replace the form of government itself. Inquiry into political belief and association, the effort to expose such belief or association with sanctions to effect compulsion, whether for purposes of criminal prosecution or otherwise, by any agency of government invades the area of governmental powers reserved to, and exercised by, the people and subverts our very governmental structure.

For all these reasons there was an inherent lack of power in the court to compel answers to the questions here involved. Whether the government might investigate into areas involving political association in connection with some legitimate end such as prosecution of election frauds is not the issue here. This case presents the question whether *an individual* may be required by governmental power to disclose *his own* political beliefs and association in any context. The problem here, then, is the right of the individual to freedom in this field not the power of government to invade the general area of political belief and association in ways not presenting an effort to compel the individual to disclose what political party he belongs to or what political philosophy he espouses.

Argument.

(1) Under the First Amendment the Rights of Assembly and Association Are Conjoined as Cognate Rights With Freedom of Speech and Petition as the Bedrock of Democratic, Representative Government and the Area so Defined Is One in Which the Government Has No Power to Intrude, so as to Compel Individuals to Disclose Their Political Beliefs or Their Political Associations.

(a) The First Amendment Is an Absolute Guarantee of the Individual's Right to Freedom of Thought and Advocacy Preventing Compulsory Disclosure of Political Opinion and Association.

The First Amendment was conceived and has been applied as a charter of government purposed to vouchsafe to the people their sovereignty over the state. The American Revolution established the supremacy of the people and their right to select their form of government, to determine its policy, to choose their agents to administer that policy, and, if need be, to change the very form of government itself. Indispensable to the preservation of these rights are the freedoms formulated in the First Amendment. The very political system created by the Constitution can function only when the people are free to examine and advocate all forms of political thought, to test its validity by discussion and application—only when they are relieved of all restraint in the intellectual processes of political speculation and the societal process of exchanging ideas.

> "They [*i. e.*, 'those who won our independence'] believed that freedom to think as you will and to

speak as you think are means indispensable to the discovery and spread of political truth. . . ." (Brandeis, J., concurring in *Whitney v. California,* 274 U. S. 357, 375; 71 L. ed. 1095, 1105.)

The guarantees were calculated to assist in the very procedures of legal and governmental change provided in the Constitution itself:

"The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come. Instead, they wrote Article 5 and the First Amendment, guaranteeing freedom of thought, soon followed. . . ."

* * * * * * * *

". . . Whatever attitude we may individually hold toward persons and organizations that believe in or advocate extensive changes in our existing order, it should be our desire and concern at all times to uphold the right of free discussion and free thinking to which we as a people claim primary attachment." (*Schneiderman v. U. S.,* 320 U. S. 118, 137, 139, 87 L. ed. 1796, 1808-9.)

The Bill of Rights is posited on the premise that it is the exercise of the rights vouchsafed that lies at the very heart of representative government and political development reflecting the desires of an informed and alert citizenry:

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free gov-

ernment by free men. It stresses, *as do many opinions of this Court,* the importance of preventing the restriction of enjoyment of these liberties." (Emphasis added.) (*Schneider v. Irvington,* 308 U. S. 147, 161; 84 L. ed. 155, 164-5. See, also, *Stromberg v. California,* 283 U. S. 359, 369, 75 L. ed. 1117, 1123; *De Jonge v. Oregon,* 299 U. S. 353, 365, 81 L. ed. 278, 284.)

The struggles out of which the American concept of government grew pointed to the dangers of government coercion upon the minds and wills of the electors. The Amendment was written that all might be free to participate in the choice of men and measures, and that those selected might never dictate a subsequent selection. Allegiance to no political creed can be required, nor can citizens be compelled to declare their convictions—no matter how sharp their dissent.

". . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

"It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."

* * * * * * * *

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*Board of Education v. Barnette,* 319 U. S. 624, 641, 642, 87 L. ed. 1628, 1639.)

The right to free thought and speech is absolute. The government can never interfere with speech or advocacy, as such. When words are used not to persuade but to incite to violence and crime the state may interfere—not against the speech but against the violence and crime. But even here the state may interfere only when the nature of the words and the circumstances of their use create an extremely imminent danger of the evil the state can prevent—not where the opportunity for discussion still remains. (*Rutledge J., in Musser v. Utah,* 92 L. ed. 355, 359 Adv. Op. (1948); *Thomas v. Collins,* 323 U. S. 516, 530, 89 L. ed. 430; *De Jonge v. Oregon, supra,* at p. 364; *Thornhill v. Alabama,* 310 U. S. 88, 104, 84 L. ed. 1093, 1103; *Bridges v. California,* 314 U. S. 252, 263, 86 L. ed. 192, 203; See quotation from Thomas Jefferson in *Reynolds v. United States,* 98 U. S. 145, 163, 25 L. ed. 244, 249.)

That the advocacy is a call to action affords no basis for state intrusion. Every idea, as Mr. Justice Holmes observed, "is an incitement" (dissenting, *Gitlow v. New York,* 268 U. S. 652, 673, 69 L. ed. 1138, 1149), and that

speech might urge to far-reaching political change is implicit in the guarantee of the Amendment:

> "We do not mean to say there is not, in many circumstances, a difference between urging a course of action and merely giving and acquiring information. On the other hand, history has not been without periods when the search for knowledge alone was banned. Of this we may assume the men who wrote the Bill of Rights were aware. But the protection they sought was not solely for persons in intellectual pursuits. *It extends to more than abstract discussion, unrelated to action.* The First Amendment is a charter for government, not for an institution of learning. *'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts. Cf. Abrams v. United States,* 250 U. S. 616, 624, and *Gitlow v. New York,* 268 U. S. 652, 672, *dissenting opinions of Mr. Justice Holmes.* Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given." (*Thomas v. Collins,* 323 U. S. 516, at 537, 89 L. ed. 430 at 444.) (Emphasis added.)

(b) The Rights of Assembly and Association for Political Purposes Enjoy a Similarly Absolute Guarantee Under the First Amendment as Inseparable Parts of the Totality of Its Protection of the People's Role in Democratic Government. They Therefore Deprive Government of the Power to Compel an Individual to Disclose His Political Associations.

While more may be claimed for the scope of the First Amendment's protection, *at the very least* it is correct to say that the individual is free to hold such political ideas as he deems best and to associate with others to advance

them. The minimal reach of this freedom is to deny the powers of government to compel the individual to disclose his political beliefs and associations. We are not concerned with the individual's willingness to make such disclosures even before governmental agencies. We are presented only with the power of government to *compel* them. This we submit government may not do for this power would make the holding of ideas and the making of associations things which depend on official approbation. Then indeed would government become the master, not the servant, using orthodoxy as the shibboleth of a precarious freedom.

Assembly and association are but the methods by which the freedom to think and speak are realized in the political sphere. Isolated opinion and purpose are political ciphers; they have no effective existence. The essence of the democratic spirit, in our society, is the opportunity for any one or more, unrestrained by government, to become a majority. An agency of government which limits this opportunity through compulsory disclosure of its exercise by an individual destroys the very premise upon which our governmental system functions. The rights to assemble and associate around an idea or program are secured, not simply to insure the integrity of the individual's spirit, but primarily to make it possible for him to share with his fellows in the work of government.

> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guarantee with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *DeJonge v. Oregon,* 299 U. S. 353, 364, 81 L. Ed. 278, 283,

57 S. Ct. 255, and therefore are united in the First Article's assurance. Cf. 1 Annals of Congress 759, 760.

"This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience [citing cases]. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." (*Thomas v. Collins,* 323 U. S. 516, 530-1, 89 L. ed. 430, 440-1.)

"One of the chief reasons for freedom of the press is to insure freedom, on the part of individuals at least, of political discussion of men and measures, in order that the electorate at the polls may express the genuine and informed will of the people. Brandeis, J., in *Whitney v. California,* 274 U. S. 357, 375. Hughes, C. J., in *Stromberg v. California,* 283 U. S. 358, 369. Individuals seldom impress their views upon the electorate without organization. They have a right to organize into parties, and even into what are called 'pressure groups,' for the purpose of advancing causes in which they believe." (*Bowe v. Secretary of the Commonwealth,* 320 Mass. 230, 252.)

"The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to be almost as inalienable in its nature as is the right of personal liberty. No legislator can attack it without impairing the foundations of society." (de Tocqueville, Alexis, *Democracy in America* (N. Y. 1946), Vol. I, p. 196.

Political association is not different from political assembly. In the American scene, as in other nations where representative governments exist, the formation of political parties has been not only the accepted but the necessary form of political action and expression. Such association is a conduit between thinking and political action, it is a realization of the right to have and to be an audience. It is only an exercise of speech adapted to the realities of our times, and it is fully protected by the First Amendment.

> "This right to speak freely and to assemble peaceably for any lawful purpose without interference by either state or federal government officials ordinarily is thought of in connection with speaking and assembling in a *public* forum. However, there is nothing in the Constitution or in the cases decided under the First Amendment which limit these rights to such circumstances. The freedom and liberty to express ourselves *privately* and to hold *private* assemblies for lawful purposes and in a lawful manner without governmental interference or hindrance is protected as much by the First Amendment as the right to do so *publicly*. Limitation in this regard would be such a serious encroachment upon our liberties and freedoms as to render the preeminent rights guaranteed by the First Amendment nugatory in large areas of legitimate action." (*Local 309 U. F. W. A. (CIO) v. Gates, Governor of Indiana,* 75 Fed. Supp. 620, 624.)

(c) The Questions Here Involved Must Be Viewed in the Context of the Times, and so Viewed, a Court Order Compelling Answers to Them Is a Plain Intrusion Upon the Scope and Purpose of the First Amendment as Above Set Forth.

The exercise of these rights is as effectively abridged by the process of compelling the participants to disclose their political associations through grand jury interrogation as by criminal prosecution. We would be blind to the facts of the time if the grand jury investigation were viewed as an isolated phenomenon. The official governmental drive against Communists and their philosophy dates, in recent years at least, back to the old Dies Committee some ten years ago. Since then, but for a brief interlude when our government and the socialist state made common cause against fascism, the campaign against Communism has achieved, in a rising crescendo of partisanship and political bigotry, the full panoply of a crusade. Federal and state legislative committees have arrogated to themselves the power to summon citizens and their papers and force them to disclose their political convictions on a wide range of national and international questions. Organizations of all kinds—fraternal, social, political, economic—have been subjected to similar scrutiny and inquisition. These committees have had the audacity to affix their seal of official disapproval on a vast gamut of ideas current in the thinking of our citizens today. The Appendix sets forth a brief sampling of the ideas and associations officially stamped unorthodox, and therefore "Communist," by the Committee on Un-American Activities of the House of Representatives. It shows beyond cavil that government power is being used to identify in the political field that which it will not tolerate and, for

that reason, to censor from the American political arena those ideas and that action which the government would forbid to the people. It further shows that government power has applied drastic economic and penal sanctions to enforce this censorship.

Anyone who advocates the verboten ideas or associates with others for the purpose of such advocacy is subject to being labeled a Communist. One so labeled—whether or not he be in fact a member of the Communist Party—may find his political, social and economic existence threatened, as well as face the danger of criminal prosecution.

We submit that in any context the citizen may not be compelled to disclose or declare his political allegiances, directly by admission or indirectly by denial of any creed. But in the context outlined in the Appendix an effort to compel such disclosure by judicial sanction is tantamount to coercion. It is in times of political stress that the limitations upon the government's powers over the individual citizen must be observed with all the clarity and nicety of which judicial detachment is capable. In such times the achievements of freedom hang in the balance.

As we have already pointed out the questions involved in this case were calculated to elicit answers showing whether or not appellants are associated with the Communist Party. The government blandly says to this court that such association is not criminal. We agree that under the First Amendment it cannot be. This being the case, the appellants' choice to be or not to be Communists, if such they have made, is a choice for them alone to make in the seclusion of their own intellects. It is for them to hold to their bosoms or declare to the world, as they choose and when they choose. If citizens can be forced to declare

their political convictions at a time chosen by the government, the freedom of the citizen under the First Amendment is gone and the power of the state to coerce the choice of the electorate has been established. To assert this power in times like the present when the crusade against one form of political belief is in full tide is to confer upon the state a terroristic coercion at the most sensitive and determinative point in our entire democratic process. Our constitution and our heritage denies this power to any agency of government.

(2) The Fourth and Fifth Amendments, Dealing With Searches and Seizures and the Privilege Against Self-incrimination Give the Citizen a Right of Privacy, and Silence Against Any Effort to Compel Disclosure of His Political Associations and Beliefs.

The Bill of Rights conjoins the guarantees of the First Amendment with the safeguards against unreasonable searches and seizures and self-incrimination of the Fourth and Fifth Amendments to achieve protection against compulsory disclosure of private opinions and affiliations. Tempered in the fire of religious and political upheaval and hammered out in the struggle of the human mind to rid itself of oppression, these protective shields were developed to meet the same intrusions on individual privacy of opinion and affiliation as that presented in the case at bar. The privilege against self-incrimination finds its genesis in the struggle against enforced conformity to the established religion and to the divine rights of the Stuart monarchs. Techniques developed in England for the searching out of heretics and political dissenters were adopted in colonial America by royal governors and later

by post-Revolutionary War state governments for the suppression of tories. This long and bloody history was fresh in the minds of those who won our independence, and it was to prevent its recurrence that the Bill of Rights was written.

In 16th Century England, the state religion through the ecclesiastical courts undertook a crusade against heresy in which compulsory disclosure of belief was the principal weapon. Following a secret inquisition in which the surmises and gossip and malevolence of neighbors and townsmen had been gathered, the accused was brought to trial, placed under oath and interrogated concerning his religious views. See Henry Charles Lea, *A History of the Inquisition of the Middle Ages,* I, p. 407.)

This procedure received a telling blow when Sir Edward Coke, Chief Justice of Common Pleas, granted a writ of prohibition against the High Court of Ecclesiastical Cause in the *Edward Case,* 13 Rep. 9. Coke's ruling was a recognition that men may not be examined or adjudged upon their opinions and beliefs,

> ". . . in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words and not of the intentions or thoughts of his heart; and if any man should be examined upon his oath of the opinion he holdeth concerning any point of religion, he is not bound to answer the same."

Compulsory disclosure persisted in England and became a weapon of the Court of the Star Chamber, designed to suppress political dissent. Here again, individuals were summoned on the basis of rumor and gossip, questioned concerning their beliefs concerning absolute monarchy, and adjudged upon that which they held in their minds. This

method foundered in the case of one John Lilburn, an opponent of the Stuarts who, before the Star Chamber, refused to answer questions "concerning other men to ensnare me and to get further matter against me" (see 3 How. St. Trials 1315, *et seq.*) Although Lilburn was whipped for his resistance, his case led to the abolition some two years later of the Court of the Star Chamber and to the statutory prohibition that compulsory disclosure no longer be required in penal matters. So deeply did the revulsion of that entire procedure run that a few years later Lilburn's sentence was vacated and he was granted handsome reparation for the punishment he had been given.

The struggle against such compulsory disclosure was deeply imbedded in the factors which led to the early emigration to America. Not only was it used to exact conformity but it was also used to harass dissenters who had determined to leave the country (see R. Carter Pittman, 21 Va. Law Rev. 763, *et seq.*). In colonial America, the same device was used to exact conformity from those who dissented from the prevailing religious views in Massachusetts. The story of the trial of Ann Hutchinson, who was banished for unorthodoxy from the Massachusetts colony after conviction upon compelled admissions under oath, has been told by Mr. Justice Black. *Adamson v. California,* 332 U. S. 46, 88, 91 L. ed. 1903, 1928.

As it was there pointed out, such experiences as Mrs. Hutchinson's led to the public demand for the Bill of Rights in order to erect a barrier against laws "that encroached on the domain of belief," and "strip courts and all public officers of a power to compel people to testify against themselves."

Later, following the Revolutionary War, tories in some states were required to give oaths respecting their past allegiance to the revolutionary cause as a condition of voting or holding property. Such a requirement in Pennsylvania was voided on the basis of language in the state constitution similar to that of the Fifth Amendment prohibiting self-incrimination. *Respublica v. Gill,* 3 Yeates 429, discussed at 161 U. S. 633, 40 L. ed. 833.

Alexander Hamilton led the battle against similar legislation in New York and his writings contributed largely to the decision of the United States Supreme Court in *Cummings v. Missouri,* 71 U. S. 277, 330, 18 L. ed. 356, 365. These evils were designedly prohibited by the Bill of Rights which was established to protect the citizens against the possible tyrannies of the new government should it find itself indulging in the practices of English and continental despotism.

The Supreme Court of the United States has recognized these origins of the Fourth and Fifth Amendments. The principles laid down by Lord Camden in *Entick v. Carrington,* 19 How. St. Trials 1029, who denounced the general search warrant, were taken over by the United States Supreme Court in its construction of the Fourth Amendment. Here the search warrant was denounced in these words:

> ". . . It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense."—*Boyd v. U. S.,* 116 U. S. 616, 630, 29 L. ed. 746, 751.

It is now judicially recognized that because of their very historical background here traced these two amendments conjoin to protect individuals from inquisitorial investigation in matters of the mind and of their private papers and effects. See *Brown v. Walker,* 161 U. S. 591, 596, 40 L. ed. 819, 821.

> "It would not be possible to add to the emphasis with which the framers of our Constiution and this court (in *Boyd v. United States,* 116 U. S. 616, in *Weeks v. United States,* 232 U. S. 383, and in *Silverthorne Lumber Co. v. United States,* 251 U. S. 385) have declared the importance to *political liberty* and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties to the other fundamental rights of the individual citizen;—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly overzealous executive officers."—*Gouled v. United States* (1920), 255 U. S. 298, 303, 65 L. ed. 647, 650, Clarke, J. (Emphasis added.)

> "No one can read these two great opinions (*Entick v. Carrington,* 19 How. St. Tr. 1030, 1074, and *Boyd v. United States, supra*), and the opinions in

the *Pacific R. Commission* case, without perceiving how *closely allied* in principle are the three protective rights of the individual—that against compulsory self-accusation, that against unlawful searches and seizures, and *that against unlawful inquisitorial investigations.* They were among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640. Even the shortest step in the direction of curtailing one of these rights must be halted *in limine,* lest it serve as a precedent for further advances in the same direction or for wrongful invasions of the others."—Sutherland, J., *Jones v. Securities and Exch. Com.* (1935), 298 U. S. 1, 28, 80 L. ed. 1015, 1027. (Emphasis supplied.)

See, also *U. S. v. Bell,* 81 Fed. 830, at 836.

Significantly these principles have also been part of the political consciousness of our citizens; they are not reserved for the rarified atmosphere of courts and law offices. In 1835, Thaddeus Stevens, then a member of the Pennsylvania State Legislature, undertook by legislative investigation to inquire into the Masonic Order. His subpoena to a minister and to a former governor were disobeyed on the ground that the investigation invaded individual liberties of belief and affiliation. Stevens' attempts to cite the recalcitrant witnesses for contempt were rejected by the Legislature on the same grounds. Subsequently Stevens' efforts to enlist the aid of William Henry Harrison, later to become president, in suppression of the Masons was rejected also on the ground that no

government power exists to inquire into or abridge the individual's right to belief and association.

> Woodley, T. F., *Thaddeus Stevens* (Pennsylvania 1934).

In the middle of the 19th Century, congressional investigations were made of alleged election irregularities in New Jersey and elsewhere. In these cases voters were summoned and asked how they voted. Their refusal to testify was respected by the Legislative Committee and secondary evidence was taken on the question. The right of the citizen to keep secret his political conviction and vote was accepted as a matter of course.

> *Congressional Globe,* 29th Cong., 1st sess. 1845-46, app. p. 455.

In summary, then, we conceive it to be the law of this land that citizens have indefeasible rights of privacy attendant upon the matters of their minds, their beliefs, their affiliations and their personal records of the same in their private papers. These the Bill of Rights and in particular the Fourth and Fifth Amendments protect. It is imperative that the language of these amendments be read not simply in 20th Century terms but with all of the content which the practical and bloody experiences that pre-revolutionary American and British law had witnessed. The presumption of innocence, the privilege against self-incrimination, the protection against general search and seizure were developed not in a context of modern criminal litigation but out of a course of experience in which

men had been required to conform in their religion and in their politics, and such conformity was enforced through compulsory testimony of the accused, the general search warrant and many times the assumption that the accusation was itself sufficient to prove that there was some guilt. These safeguards of the Constitution grew out of the struggle for political and religious freedom against the very devices which are in this case being used once again to suppress that freedom.

The Fourth and Fifth Amendments when viewed historically, therefore, have as their central theme and direction the protection of individuals from the very type of inquisition presented by the facts of this case. They protect not simply the suspected Narcotics Act violator or the sharp merchant who may have violated the Interstate Commerce Act (compare *U. S. v. Weisman,* 2 Cir., 111 F. 2d 260, and *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. ed. 1110) against the possibility of criminal prosecution and punishment; they were designed primarily to protect the persons and organizations whose views run counter to either official orthodoxy or prevailing opinion. They were developed so that the rights outlined in the First Amendment could have protection in practical life from the interests of those who would not tolerate opposition. The First Amendment defines the right of political belief and affiliation. The Fourth and Fifth Amendments are impassable barriers into the use of governmental power to limit or destroy the exercise of such rights.

(3) The People Under the Ninth and Tenth Amendments Have Reserved to Themselves Governmental Powers, and Compulsory Testimony Concerning Political Association and Belief Invades the Area of Government Reserved to the People.

We have heretofore presented the rights guaranteed by the First Amendment as a limitation on the power of the state as against individual citizens. The exercise of these rights is the exercise of governmental powers reserved to the people by the Ninth and Tenth Amendments to the Constitution of the United States. Interference with such an exercise by any agency of government (here by attempting to compel appellants to disclose their political associations and beliefs) must be struck down as an invasion of the governmental powers of the sovereign branch of government by those exercising delegated powers.

Under the Constitution, the federal government exercises certain delegated powers only; the remaining governmental powers are reserved to the states and the people. *Ninth and Tenth Amendments to the Constitution of the United States.*

The people hold a two-fold position in our structure of government. They are the sovereign, the source of all delegated governmental powers; at the same time they, as the sovereign, perform essential and separate governmental functions.

Among the governmental functions reserved to and exercised by the people is participation in the myriad forms of action, including political discussion and association, embraced within the electoral and legislative processes. As the Supreme Court said in *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. Ed. 220, "Sovereignty itself remains with

the people," as the "ultimate tribunal of the public judgment," acting either through "the pressure of opinion or by means of suffrage" and exercising the most fundamental governmental functions, because they are "preservative of all rights." Just as the courts interpret and apply the law in judicial proceedings, so the people exercise their governmental powers of voting, of speech, of petition, and of assembly and association, to bring about such changes in the law and its administration as they deem necessary, wise, or just. *Bridge Co. v. U. S.,* 105 U. S. 470, 482, 26 L. ed. 1143, 1148.

As the sovereign, the people reserved to themselves and to the states the powers not delegated to the federal government; the Ninth and Tenth Amendments were adopted to make explicit what was already implicit. So, too, freedom of speech, press, and association, those indispensable corollaries of the powers reserved to the people, were spelled out by the Bill of Rights. *Grosjean v. American Trust Co., 297* U. S. 233, 80 L. ed. 660; *Powe v. U. S.* (5 Cir.), 109 F. 2d 147 (cert. den. 309 U. S. 679, 84 L. ed. 1023).

In *United States v. Cruickshank,* 92 U. S. 542, 23 L. ed. 588, the court said:

> "The government thus established and defined is to some extent a government of the States in their political capacity. It is, also, for certain purposes, a government of the people . . . The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always has been one of the attributes of citizenship under a free government . . . It was not, therefore, a right granted

to the people by the Constitution. The Government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection . . . The right was not created by the [First] Amendment; neither was its continuance guaranteed, except as against congressional interference . . . the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the National Government, is an attribute of national citizenship and, as such, under the protection of and guaranteed by, the United States." (See also *U. S. v. Classic,* 313 U. S. 299, 85 L. ed. 1368; *Ex parte Yarbrough,* 110 U. S. 651, 28 L. ed. 274; *In re Quarles,* 158 U. S. 532, 39 L. ed. 1080.)

"*In a system of popular government the existence of this liberty* (freedom of speech and of press) *is imperative; because, when people frame their constitutions and laws they necessarily reserve to themselves the power to alter or amend them and to change their representatives and officials and even their government at will.* Where individual citizens *participate in the framing of laws and the selection of officials,* they must necessarily be permitted to express their opinion; in order to formulate opinions, *they must know the facts* and circumstances which justify or fail to justify the enactment or repeal of statutes or constitutional provisions, and the merits and demerits of those who aspire to political office . . . *Government by the people is utterly inconsistent with a press not free* and universal suffrage becomes a farce unless speech is free. The conception of *lese majeste* and of the Divine Right of Kings has long since disappeared and we must not make the mistake of substituting

therefor a Divine Right of the Majority." Patterson, "Free Speech and a Free Press," pp. 6-7. (Emphasis added.)

"These judges know that statutes, to be sound and effective, must be preceded by abundant printed and oral controversy. *Discussion is merely legislation in the soft. Hence drastic restrictions on speeches and pamphlets are comparable to rigid constitutional limitations on law making.*" Chaffee, pp. 360-361. (Emphasis added.)

A hundred and fifty years ago in a period of history remarkably similar to the present in its fear of ideas and its justification for their suppression, Madison's Virginia Resolution opposed the American Sedition Act of 1798 because under it Congress would exercise powers which the people did not delegate to it and which were expressly forbidden by the First Amendment. The resolution stated "that such powers more than any other ought to produce universal alarm because it was leveled against that right of freely examining public characters and measures, and all free communication thereof, which has ever been justly deemed the only effectual guardian of every other right." Patterson, in his "Free Speech and Free Press" (p. 134), calls attention to the fact that Madison was chairman of the committee of Congress that drafted the first ten amendments and the preamble to the statute proposing them, and that, therefore, "his argument assumed more than usual importance." See also Patterson's "Free Speech and Free Press," pp. 6-7, 14, 228; Chaffee, "Free Speech in the United States," pp. 234, 350-1, 550-63.

The critical balance between limitless power, which is tyranny, and a constitutional democracy can be maintained by constant popular supervision, and then only if the

people can exercise their governmental powers without obstruction or interference by the agencies supervised.

The heart of our constitutional system is found in the proposition that each branch of the government must be free from the domination, control, or interference of any other branch of the government. Out of this concept has developed the doctrine of separation of powers.

This doctrine has been applied to the three delegated branches of government in order to insure the independence of each branch. The "checks and balances" to be exercised by each branch against the other, which were so much relied on by the framers of our Constitution, could only be accomplished by independent agencies; a subjugated executive could scarcely check a dominating Congress, and a frightened judiciary could not resist an aggressive President. Genuine independence requires not only economic independence, but, at a minimum, freedom from invasion by other agencies.

In the case of *O'Donoghue v. United States,* 289 U. S. 516, 77 L. Ed. 1356, holding that the legislature could not reduce judicial salaries because such power would provide the means for its control of the judiciary, the court said:

> "If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the

> sense that the *acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments.*" (*Humphrey's Executor v. United States,* 295 U. S. 602, 79 L. Ed. 1611.)

Although the doctrine of separation of powers has most generally been enunciated in controversies involving delegated branches of government, the principles underlying it are all-pervasive and must be applied wherever governmental power is to be found.

The Constitution protects the governmental powers of citizens, including the right of association in a political party; accordingly the legislature may not prescribe political orthodoxy, and the courts may not compel a declaration of political allegiance, any more than the judiciary may interfere in the exercise by the legislature of the powers conferred upon it. Even an attempt to interfere must be stricken down.

> ". . . It would be an abuse of judicial power for the courts to *attempt to interfere with the constitutional discretion of the Legislature.*" *Bridge Co. v. U. S.,* 105 U. S. 470, 482, 26 L. Ed. 1143, 1148. (Emphasis added.)

The courts may no more exercise power over a citizen's liberty to require him to disclose his political affiliations than the legislature may use its power to compel a judge to give his opinion concerning a case pending before him.

> "Libanius says, that at 'Athens a stranger, who intermeddled in the assemblies of the people, was punished with death.' This is because such a man usurped the rights of sovereignty." (Montesquieu, Spirit of Laws (Cincinnati, 1873), Vol. I, p. 10.)

When exercising governmental functions, the people enjoy an immunity which can be compared to that conferred upon legislators, and for similar reasons. Article I, Section 6, clause 1, of the Constitution states with respect to congressmen: ". . . for any speech or debate in either house, they shall not be questioned in any other place." This protection stems from a deep public interest in encouraging congressmen to participate freely and without limitation in their legislative function. The Constitution protects legislators even against their own misconduct, for fear that otherwise they might fail to conduct themselves with courage on proper occasion. *Kilbourn v. Thompson,* 103 U. S. 168, 26 L. Ed. 377.

The people, too, need this protection. If a citizen may be compelled under pain of criminal punishment to answer questions concerning his political activity, that is, his political association, political speech, political ideas, this in itself is a direct interference with the free exercise of that association, that speech, and those ideas. Just as the congressmen must select for themselves what they will rely upon in statements made by their fellow congressmen, so the people must select for themselves what they will accept in the marketplace of ideas.

> "But it cannot be the duty, because it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because

the forefathers did not trust any government to separate the true from the false for us." Jackson, J., concurring in *Thomas v. Collins,* 323 U. S. 516, 545.

In *City of Chicago v. Tribune Co.* (Ill., 1923), 139 N. E. 86, 28 A. L. R. 1368, the Chicago Tribune attacked the city administration editorially, claiming that officers were guilty of fraud and mismanagement. The city filed suit for libel, asserting that the editorials were false and malicious and injured the business credit of the city and its ability to sell its bonds to the public. A demurrer was sustained, the court saying:

". . . The American system of government is founded upon the fundamental principle that the citizen is the fountain of all authority. . . . For the same reason that members of the legislature, judges of the courts, and other persons engaged in certain fields of the public service or in the administration of justice, are absolutely immune from actions, civil or criminal, for libel for words published in the discharge of such public duties, *the individual citizen must be given a like privilege when he is acting in his sovereign capacity.* This action is out of tune with the American spirit, and has no place in American jurisprudence." (Pp. 1375-7; emphasis added.) (*Cf.* Cooley, "Constitutional Limitations.")

The case of *United States v. Owlett,* 15 Fed. Supp. 736, recognizes the same principle:

"The investigation (of WPA by a state committee) is an interference with the proper governmental func-

> tion of the United States of America. The *complete immunity* of a federal agency from state interference is well established." (Emphasis added.)

The immunity of the federal agency there is no greater than the immunity of the private citizen here, for all citizens have complete immunity in the exercise of their governmental functions (including political association) from any interference by any branch of the government exercising delegated powers.

If it is necessary that the branches of the government, having only delegated authority, remain independent (doctrine of separation of powers), can it be doubted that it is essential that the people exercising reserved sovereign powers retain complete independence? Otherwise, the delegated authority would be free to suppress the sovereign power of the people.

Care should be exercised to distinguish between the people as individuals governed by the state and the people as instruments of government sharing with the branches of the state the powers recognized by the Constitution, including those reserved to the people. The authority of the people as participants in government includes at least the right of assembly, association, and political affiliation. It is these subjects, and these only, which were the object of the grand jury's questioning. And it was beyond the power of the court below to compel answers to such questions because to do so would constitute an invasion of the powers reserved to the people by the Ninth and Tenth Amendments to the Constitution of the United States.

III.

The Court Below Erred in Refusing to Hear and to Take Evidence Upon Appellants' Challenge to the Composition and Selection of the Grand Jury. [Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 6, Clk. Tr. p. 104.]

Appellants' challenge to the composition and selection of the grand jury was presented in writing together with a motion to quash the subpoenas [Clk. Tr. pp. 2-4; Rep. Tr. p. 6]. While it lacked the usual supporting affidavits and points and authorities, this was attributable to lack of time [Rep. Tr. p. 8]. In any event its denial rested solely on the ground that a witness has no standing to make the challenge [Rep. Tr. p. 42].

It is by now well established that a grand jury panel not selected in accordance with the requirements so as to represent a fair cross section of the community from which it is drawn cannot return a valid true bill. *Ballard v. United States,* 329 U. S. 187, 91 L. ed. 181; *Thiel v. Southern Pacific Co.,* 328 U. S. 217, 90 L. ed. 1181; *Glasser v. United States,* 315 U. S. 60, 86, 86 L. ed. 680, 707. The only proper function of the grand jury being the investigation of crime *in order to return indictments,* an improperly constituted grand jury cannot function; it is a legal nullity without power to interfere with the lives of citizens or intrude upon their sovereign and sacred duties under our governmental structure.

Notwithstanding *Blair v. United States,* 250 U. S. 273, 63 L. ed. 979, we submit that our point is valid. Let it be pointed out at the outset that the power of persons other than the accused to challenge the validity of the grand jury is not without recognition in our law.

> "The objection [*i. e.,* challenge to the panel] may be raised at this early stage [*i. e.,* the stage before in-

dictment] by one who apprehends that he will be indicted, or by any other person as *amicus curiae.*"

Olfield, *Criminal Procedure from Arrest to Appeal,* National Conference of Judicial Councils, 1947, p. 153.

See also:

2 Wharton, *Criminal Procedure* (10th Ed., 1918), p. 1277.

A person *about to be investigated* by a grand jury has been held to have standing to challenge its qualifications, this result being reached upon the thesis that anyone who is *affected* by the action of the grand jury has a right to object to the manner in which it is organized and to its conduct. *United States v. Blodgett* (D. C., Ga.), 35 Ga. 336. A taxpayer may by writ of mandate or prohibition prevent the action of a grand jury that was illegally constituted because improperly selected. *Davis v. Arthur,* 139 Ga. 74, 76 S. E. 676. Similarly persons about to be investigated by a grand jury engaged in a function it may not perform by law are entitled to a writ of prohibition to prevent the investigation. *McNair's Petition,* 324 Pa. St. 48, 187 Atl. 498.

The *Blair* case, *supra,* is grounded on the thesis that a witness may not "take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is, *in the ordinary case,* no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not." (Emphasis added.) (250 U. S. at p. 282, 63 L. ed. at p. 983.) That case involved a challenge to a particular investigation on the ground that the statute, violations of

which were under investigation, was unconstitutional. The court plainly presumes the validity and regularity of the grand jury and holds that it has power itself to take evidence to determine whether in any particular situation it may go ahead.

But here appellants attack the very basis of the grand jury's right to exist *for any purpose*—viz., its being a representative cross-section. Moreover, and of greater importance, the grand jury in the case at bar presumed to intrude upon an area protected by the First Amendment where no agency of the state may enter and where it invaded the authority of another branch of government (see Point II, *ante*). Here patently no presumption of regularity or validity exists and the ordinary presumptions concerning the grand jury's authority, even the *de facto* existence of the grand jury, must give way to the "preferred place" of the "indispensable democratic freedoms." *Thomas v. Collins,* 323 U. S. 516, 530, 89 L. ed. 430; *United States v. Carolene Products Co.,* 304 U. S. 144, 152, 82 L. ed. 1234, 1241.

Since the grand jury was called to, and did, invade the rights of appellants under the First, Ninth and Tenth Amendments, they stand as no strangers to the proceedings. They are persons affected as fully as the defendant who is accused by the grand jury's action. Here we are concerned not simply with the inconvenience of a witness or his public duty to give information. We are concerned with citizens against whom the court's process was used in such a manner that their individual personal freedoms and governmental powers were invaded. They should be accorded every standing the law can provide to challenge the legal existence of a body which was prepared so vitally to affect them.

IV.

The Court Below Erred in Ordering Appellants to Answer the Questions Put to Them Before the Grand Jury and in Adjudging Appellants in Contempt for Their Refusal to Answer Said Questions in That Said Grand Jury Was Not Conducting a Bona Fide Investigation but Was Carrying Out a Scheme, Plan and Design to Harass and Annoy Appellants Because They Were Believed to Be Members of the Communist Party, a Political Organization, and Discriminatorily to Apply the Laws of the United States Against Appellants in Such a Manner as to Impose Punishment Upon Them Solely and Exclusively for the Reason That They Were Believed to Be Members of Said Communist Party. [Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 5. Clk. Tr. pp. 103-4.]

At the outset of the proceedings below appellants sought to quash the subpoenas on the grounds, *inter alia,* that the Grand Jury before which they were summoned was not engaged in a bona fide investigation of crime but in the effectuation of a "plan and design to harass and annoy persons believed to be members of the Communist Party of the United States and to discriminatorily apply the law against such persons . . ." [Clk. Tr. p. 4; Rep. Tr. p. 6]. The motion to quash on this ground was denied [Rep. Tr. pp. 42-3]. The same contention was urged on the government's motion to compel appellants to answer and an offer to prove facts in support of it was rejected [Rep.

Tr. p. 86]. Again in the contempt proceedings the contention was urged and an offer of proof rejected [Rep. Tr. pp. 244, 248].

That appellants were essentially accurate in their claim is borne out in part at least by the questions they were asked. The Grand Jury did conduct, not an investigation into crime, but an inquisition into political belief and association.

The motion to quash and the defense to the charges of contempt were that the Grand Jury was carrying out a scheme, plan and design to harass and annoy and to apply the law discriminatorily against appellants solely by reason of their political affiliation. This, if true, constitutes "unequal and unjust discrimination" in the administration of the law, an application of the court's processes "directed so exclusively against a particular class . . . with a mind so unequal and oppressive as to amount to a practical denial" of equal protection of the laws. (*Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. ed. 220.]

Appellants will be among the first to recognize the salutary role played by the Grand Jury, when properly administered, in securing adequate law enforcement and providing that essential nexus between official bureaucracy and the people in the effectuation of the laws. But under our system of government no agency, body or group of citizens has authority or standing to engage in inquiries into the politics of citizens. When this kind of inquiry is directed in a planned and systematic way against citizens

thought to be of one political persuasion, only because of that persuasion, the wrong is compounded. For under these circumstances the very procedures of the courts are being perverted into instruments of oppression whereby one group of citizens are singled out simply because of their politics. Whether it be in the administration of a regulatory statute designed for a specific purpose or the general processes and procedures of courts and grand jury, the law must be applied equally and without differentiation.

> ". . . Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor, etc. of New York,* 92 U. S. 259 [Bk. 23, L. ed. 543]; *Chy Lung v. Freeman,* 92 U. S. 275 [Bk. 23, L. ed. 550]; *Ex parte Va.,* 100 U. S. 339 [Bk. 25, L. ed. 676]; *Neal v. Delaware,* 103 U. S. 370 [Bk. 26, L. ed. 267], and *Soon Hing v. Crowley* [*supra*]." (*Yick Wo v. Hopkins,* 118 U. S. 356, 373-4, 30 L. ed. 220, 227-8.)

Appellants were entitled to an opportunity to prove their case on this point. Indeed the court was bound to be alert to the possibility of such a denial and extend to appellants every opportunity to prepare and present the facts. The court's error was a failure of justice.

V.

The Court Below Erred and Denied Appellants Due Process of Law in Contravention of the Fifth Amendment to the Constitution of the United States in That the Proceedings Leading Up to the Court's Adjudication and Sentence of Appellants Were Conducted With Unseemly Haste and Under Oppressive Conditions Wherein the Court,

(A) Refused Appellants' Counsel Reasonable Continuance for the Purposes of Preparing Evidence and Law Necessary to a Trial of the Issue Presented to the Court in Connection With the Several and Respective Motions of the Government;

(B) Required Appellants and Their Counsel to Be in Attendance Upon Said Contempt Proceedings Which Began at Approximately 10:45 O'clock at Night, After Having Been in Attendance Upon the Court or the Grand Jury Continually, Except for Meal Hours at Midday and in the Evening, From 10:00 O'clock in the Morning, and

(C) Deprived Appellants of Effective Opportunity to Consult With Their Counsel Concerning the Legal and Other Problems Created by the Questions Put to Them Before the Grand Jury. [Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 8, Clk. Tr. pp. 104-5.]

The facts concerning the proceedings leading to the judgments appealed from are outlined in the statement of the case at the opening of this brief. So rapidly were these

proceedings conducted that appellants and their counsel were, with the exception of the meal hours at midday and evening,[5] allowed no time to prepare to meet any of the proceedings which took place. Subpoenas were served at about 7:00 a.m. calling for appearance at 10:00 a.m. Appellants and counsel had three hours to consult, prepare the motion to quash and do what research of fact and law could be accomplished in that brief interval. For reasons urged, *ante,* the challenge to the Grand Jury and the claim of denial of equal protection of the laws, presented meritorious points. Obviously much greater preparation was necessary properly and adequately to present them. This was denied after counsel made the best showing in support of their application for continuance that time permitted [Rep. Tr. pp. 41-4].

When the motion to quash was denied the witnesses were ordered to appear "forthwith" before the Grand Jury [Rep. Tr. p. 44]. Within an hour, and at 3:30 o'clock p. m., appellants were back before the court on the government's motions for orders directing them to answer the questions [Rep. Tr. pp. 46 *et seq.*]. At this point there was first litigated the validity of appellants' claim of their privilege against self-incrimination. Since the government contended that the questions were not such as on their face indicated the possible incriminatory nature of appellants' answers, appellants sought to make a showing to the court of the setting in which the questions

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[5]The court adjourned for lunch at 11:30 a. m. and reconvened at 1:30 p. m. during which time counsel were given an opportunity, in addition to obtaining lunch, to research the law on the standing of a witness to challenge the composition and selection of the Grand Jury and to quash subpoenas [Rep. Tr. pp. 12-14]. The dinner recess was from 5:30 p. m. to 7:30 p. m.

were asked so that in any event the possibility of incrimination could be understood (see *United States v. Weisman; United States v. Zwillman,* and *United States v. Cusson,* all *supra,* and discussion *ante* Point I). Indeed the denial of such opportunity is itself reason for vacating the contempt judgment. (*United States v. Zwillman, supra.*) Appellants' showing was complex. Since it was elaborated in the argument under Point I, *ante,* it will not be repeated here. Suffice it to say that the required proof included

(a) certified copies of the indictments returned in the Southern District of New York;

(b) certified copies of the orders denying the motions to dismiss those indictments;

(c) certified copies of the orders setting for trial the cases brought on those indictments;

(d) competent testimony concerning, or, at the least, newspaper articles reporting, the statement by the Attorney General of his intent to bring similar prosecutions in cities throughout the country, including specifically Los Angeles;

(e) competent testimony concerning, or certified copies of, the administrative findings and determinations of the Attorney General to the effect that the Communist Party advocates the overthrow of the government by force and violence;

(f) competent testimony concerning the Attorney General's deportation drive against resident aliens who are, or are thought to be, members of or affiliated with, the Communist Party, and solely for that reason.

In the normal and rational course of human events neither appellants nor their counsel could be expected to have such proof at hand in anticipation of a completely unannounced and unforseeable contingency such as they faced at seven o'clock on the morning of October 25. Nor could they be expected to assemble such proof during the hours which passed *on that same day* between the time the subpoenas were served and three-thirty o'clock that afternoon—during all of which time they were fully engaged in essential consultation or enforced attendance upon the court and the Grand Jury.

In fact they did not have this proof available. Copies of the New York indictments were furnished by government counsel in the court room [Rep. Tr. pp. 77, 81]. But for the fortuitous circumstance that Mr. Goldschein had copies of them and was willing to make them available, this record would not have contained even this much proof. As to the other matters of defense appellants could do no more than make offers of proof because of their inability to present the evidence in so short a time and the court's refusal to grant time for this purpose [Rep. Tr. pp. 80-3]. In short, appellants and their counsel were completely unprepared and were denied time to make any preparation on the essentials of their defense.

The proceedings on the government motion for orders directing appellants to answer continued after the dinner recess until 10:00 p. m., October 25. At that time the witnesses were directed to appear before the Grand Jury "forthwith," and the court on its own suggestion remained "in attendance," "until the grand jury recesses for the night" [Rep. Tr. p. 195]. Counsel accompanied appellants to the Grand Jury room, as they had during

the afternoon session, and consulted with them outside. In thirty-five minutes appellants were hailed again before the court. The hour was then 10:35 p. m. [Rep. Tr. p. 196].

At this juncture the liberty of appellants was at stake. All participants in this rushed, day and night operation were by this time seriously fatigued; appellants and their counsel had been working since seven o'clock that morning. Even government counsel [Rep. Tr. p. 205] and the court [Rep. Tr. p. 206] admitted to being tired. The court gave as its reason for plunging forward with the trial at that late hour that the court lacked other facilities and judges to hear the case at any other time. Assuming that the District Courts are so sadly lacking in judges and facilities, it is not a valid basis for denying appellants their basic rights to due process of law. The convenience of the court and its judges and the limitations of its physical facilities must give way to the constitutional rights of the appellants. (Cooley, *Constitutional Limitations* (8th ed.), p. 704; *People v. Zammora,* 66 Cal. App. 2d 166, 235; *Powell v. Alabama,* 287 U. S. 45, 77 L. ed. 158.)

More important, appellants and their counsel, having been busily engaged for the preceding fifteen hours, were no better prepared to present their defense than at any time earlier that day. They could not have been under the circumstances. They asked for a continuance in order to prepare their defense and to get surcease from an exhausting day, and this was denied [Rep. Tr. pp. 197-205, 228-9]. The charges of contempt were heard and appellants sent to jail on the same record, with its same limitations, as that adduced at the hearings on the

motions for orders directing appellants to answer the questions [Rep. Tr. pp. 230-1, 245].

Even a person accused of heinous crime must be accorded all of the requisites of a fair trial, lest the court "mob him under the guise and empty shell of justice." (*State v. Guerringer,* 265 Mo. 408, 178 S. W. 65.) Where there was at stake, as here, not only the liberty of ten people charged with no crime, but the vindication of constitutional safeguards that go to the very heart of our democratic system, it was imperative that the court proceed with pace so measured that it could afford itself every opportunity to know the facts upon which its judgment turned. In this respect the court below failed to meet its responsibility. Appellants had *no* opportunity to prepare; this the court denied. The facts they wished to present were the very nub upon which their claim of the privilege turned. Without these facts they had no defense. The court permitted them none, for the court knew that the evidence needed would have to come from New York City and Washington, D. C., and that this could not be accomplished in a matter of hours. The court knew also that appellants and their counsel had been engaged directly before it or the Grand Jury for more than fourteen hours before the contempt proceedings began and therefore could not have assembled the evidence and witnesses needed.

In this connection it is to be recalled that the situation was not one in which the court was called upon to appraise the diligence of counsel in the light of opportunity afforded for preparation. There never had been any such opportunity. The situation at 10:35 o'clock on the night of October 25, 1948 was much the same as a defendant being called to trial on an indictment just returned with

counsel appointed to defend him as the trial began. Only at 10:35 o'clock p. m. were appellants even apprised of what it was the government proposed to do (*cf. Morgan v. United States,* 304 U. S. 1, 82 L. ed. 1129).

While continuances rest within the discretion of the trial court, this discretion is a legal one involving judicial responsibility. Denial of continuances so as to give no opportunity to prepare and present a defense is an abuse of discretion and a denial of due process of law. (*Younge v. United States,* 4 Cir., 223 Fed. 941; *United States v. Helwig,* 3 Cir., 159 F. 2d 616.]

Moreover denial of time to prepare and present a defense deprived appellants of any effective consultation with and representation by counsel. (*Nelson v. Commonwealth,* 295 Ky. 641, 175 S. W. 2d 132; *State v. Farrell,* 223 N. C. 321, 26 S. E. 2d 322; *Johnston v. Commonwealth,* 276 Ky. 615, 124 S. W. 2d 1035; *Coker v. State* (Fla.), 89 So. 222.)

While the proceeding below was not criminal in character within the strict meaning of the Sixth Amendment, it is inescapable that appellants' liberty was at stake. It is essential to every concept of fair play that in any case where liberty is involved, including contempt proceedings, the person defending be accorded every "reasonable opportunity" to meet the charges "by way of defense or explanation," including "the assistance of counsel, if requested, and the right to call witnesses." (*Cooke v. United States,* 267 U. S. 517, 537, 69 L. Ed. 767, 774.)

The proceedings below can only be characterized as having been conducted with unseemly haste under circumstances where everything meaningful in the opportunity to defend and the right to counsel were denied. It is not without significance that this occurred in the course of a case wherein the fundamental and indispensable liberties vouchsafed in the Bill of Rights (see *ante,* Points I and II) hung in the balance. Experience shows that danger to these liberties comes in times of heavy stress upon the very foundations of freedom itself. While the government will contend that the Grand Jury sought merely information the Constitution reminds us that this information was beyond its reach and that the method used to extract it is a lineal descendant of Torquemada's rack and the Star Chamber. In the midst of the current, official attack upon "Communism," to which the press bears daily witness, the government has presumed to bend the procedures of the courts to give the necessary note of legality to its illegitimate purpose. All in our judicial institutions that entitles them to be described as "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice or public excitement" (*Chambers v. Florida,* 309 U. S. 227, 241, 84 L. ed. 716, 724) requires that this court reject and repudiate such attempted perversion of judicial power. That these are times of public excitement calls for sharper, not blunter, perception of the need for judicial restraint, greater, not less vigilance against attrition of the foundations of political liberty.

Conclusion.

For each and all of the reasons stated herein, the judgments and orders of the Trial Court should be reversed.

Respectfully submitted,

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APPENDIX.

Summary of Political Ideas and Organizations Condemned by the House Committee on Un-American Activities and Techniques Used by It to Enforce Its Political Censorship.

1. Political opinions identifiable as "new deal" because of their advocacy by the late President Roosevelt. (83 Cong. Rec. 7, p. 7578.)

2. The opinion that the Committee on Un-American Activities is undesirable. (Rep. No. 592 80th Cong. 1st Sess. p. 4.)

3. The opinion that incumbent members of Congress, particularly members of the Committee on un-American Activities, should be defeated and others elected in their place. (Rep. No. 2277, 77th Cong. 2d Sess. p. 1.)

4. The following beliefs and ideas concerning the field of economics:

(a) To be in favor of a planned economy (Rep. made part of Committee's Record, Jan. 3, 1939, p. 12);

(b) To oppose monopoly (Rep. No. 592, 80th Cong. 1st Sess. p. 9);

(c) Criticism of the activities of the Standard Oil Company of New Jersey and other industrial organizations (Rep. No. 2233, June 7, 1946, p. 35);

(d) To say that landlords have highpowered lawyers while tenants do not (Rep. No. 2233, June 7, 1946, p. 11);

(e) To attack private ownership (Rep. No. 2277, 77th Cong. 2d Sess. p. 7);

(f) To believe in the abolition of inheritance (Rep. of Jan. 3, 1939, *supra*, p. 12);

(g) Skepticism as to the claims of advertisers. (Rep. on Communist Activities in Consumer Organizations Jan. 3, 1939.)

5. Advocacy of the formation of a national farmer labor party. (Rep. of Jan. 3, 1939, *supra,* p. 30.)

6. Advocacy of the Geyer Anti-Poll Tax Bill. (Rep. No. 592, 80th Cong. 1st Sess. p. 4.)

7. Advocacy of the withdrawal of American troops from China. (Rep. No. 271, 80th Cong. 1st Sess. p. 8.)

8. Belief in the desirability of the dissolution of the British Empire. (Rep. No. 2233, June 7, 1946, p. 10.)

9. Advocacy of civilian use of atomic energy and criticising its being reserved for military use only. (Rep. No. 1996, 79th Cong. 2d Sess. p. 3.)

10. Advocacy of the plan advanced by former Secretary of the Treasury, Henry Morgenthau, Jr., with respect to our policy in Germany. (Rep. No. 592, 80th Cong. 1st Sess. p. 10.)

11. Opposition to proposed legislation for universal military training. (Rep. No. 271, 80th Cong. 1st Sess. pp. 7-8.)

12. Absolute racial and social equality. (Rep. of Jan. 3, 1939, *supra,* p. 10.)

13. Opposition to the belief in the divine origin of the rights of man. (Rep. of Jan. 3, 1939, *supra,* pp. 10-1.)

14. Protesting the denial of a meeting place for a speech by Henry A. Wallace. (Rep. No. 1115, p. 11.)

15. Signing an open letter for Harry Bridges in connection with his deportation proceedings. (Rep. No. 1311, Mar. 29, 1944, p. 73.)

16. Supporting the Scottsboro, and Sacco and Vanzetti cases. (Rep. of Jan. 3, 1939, *supra,* pp. 132-3.)

17. Joining in a resolution signed by such persons as President Woolley of Mount Holyoke, Professor Chafee of Harvard, Professor Fairchild of New York University, Bishop McConnell of the Methodist Church, and Dean Fleming James of the Divinity School of the University of the South, which opposed outlawing the Communist Party. (Rep. No. 592, *supra,* p. 4.)

These Un-American Activities Committees have openly called for blacklists in private employment of citizens whose political beliefs or affiliations they denounce. Hollywood writers have been driven from their jobs and the Tenney Committee in California has urged private employers to use its annual list of "Communists" to weed out any who appear on their payrolls.

Not the least among the abuses of these committees has been the imputation of "guilt" by association. Once an organization advances a program disapproved by these committees it is denounced as "Communist" and all persons belonging to it or cooperating with it, regardless of the specific purposes sought to be achieved by the organization or the persons, are similarly denounced.

The work of the committee has been accompanied with a rash of legislation barring Communists, either described *eo nomine* or by clearly stated intent, from government service (Hatch Act, Sec. 9A, 18 USC 61(i) (old), 84 Cong. Rec. 9635, 9638; Selective Service and Training Act of 1940, section 8(i), 54 Stat. 885, 892; Act of June 26, 1940, 54 Stat. 611, C. 432, Sec. 15(f); Act of July 1, 1941, 55 Stat. 396, C. 266, Sec. 10(f); Act of July 2, 1942, 56 Stat. 634, C. 479, Sec. 9(f). See also Public Law 135,

77th Cong., approved June 28, 1941, 87 Cong. Rec. 3025 ff.; E. O. 9300, February 5, 1943; U. S. Civil Service Commission, Regulation II, Sec. 3, and statement in reference thereto 89 Cong. Rec. 10254-5, and statement of Commissioner Fleming, December 9, 1943, Hearings, Subcommittee of Committee on Appropriations, House of Representatives, 78th Cong. 2d Sess., Independent Offices Appropriation Bill for 1945, pp. 1083-7). These of course have culminated in Executive Order 9835 under which Communists are declared ineligible for government employment and a vast inquisitorial procedure has been created to track down the private lives of government employees and ferret out their political beliefs. This order further (5 USCA fol. sec. 631) empowers the Attorney General in his unfettered discretion and without hearing or judicial review to designate organizations as "Communistic," after which past and present membership therein by a process of guilt by association is cause for discharge.

The drive has reached its current apex in the New York indictments [Def. Ex. A and B, Clk. Tr. pp. 6, 10] in which the leaders of the Communist Party are prosecuted for having formed and belonged to a political party. As the indictments charge no unlawful acts of force or violence, it is inescapable that the government proceeds against those defendants because it, like the legislative committees which paved the way, disapproves of its ideas and wishes to stamp out their advocacy.